DOCKET

10

No. 83-1623-CFX
Status: GRANTED

Docketed:
March 30, 1984

Title: Phyllis A. Anderson, Petitioner
v.
City of Bessemer City, North Carolina

Court: United States Court of Appeals
for the Fourth Circuit

Counsel for petitioner: Schnapper, Eric

Counsel for respondent: Van Hoy, Philip M.

Entry	Date	Note	Proceedings and Orders
1	Jan 20 1984		Application for extension of time to file petition and order granting same until April 2, 1984 (Chief Justice, January 25, 1984).
2	Mar 30 1984	G	Petition for writ of certiorari filed.
3	May 4 1984		Brief of respondent Bessemer City, NC in opposition filed.
4	May 8 1984		DISTRIBUTED. May 24, 1984
5	May 19 1984	X	Reply brief of petitioner Phyllis A. Anderson filed.
7	May 25 1984		REDISTRIBUTED. May 31, 1984
9	Jun 1 1984		REDISTRIBUTED. June 7, 1984
11	Jun 8 1984		REDISTRIBUTED. June 14, 1984
12	Jun 18 1984		Petition GRANTED.
			**********
14	Jul 27 1984		Order extending time to file brief of petitioner on the merits until August 15, 1984.
15	Aug 15 1984		Brief amicus curiae of United States filed.
18	Aug 15 1984		Brief amicus curiae of American Civil Liberties Union, et al. filed.
19	Aug 16 1984		Brief of petitioner Phyllis A. Anderson filed.
20	Aug 16 1984		Joint appendix filed.
22	Aug 23 1984		Order extending time to file brief of respondent on the merits until October 5, 1984.
23	Aug 24 1984	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
24	Sep 5 1984		Record filed.
25	Sep 5 1984		Certified original record & C.A. proceedings, 5 volumes, received.
26	Oct 1 1984		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
27	Oct 4 1984		Brief of respondent Bessemer City, NC filed.
28	Oct 11 1984		CIRCULATED.
29	Oct 22 1984		SET FOR ARGUMENT. Monday, December 3, 1984. (3rd case).
30	Nov 23 1984	X	Reply brief of petitioner Phyllis A. Anderson filed.
31	Dec 3 1984		ARGUED.

BEST AVAILABLE COPY

1 pg

PETITION FOR WRIT OF CERTIORARI

83-1623

No. .....

Office - Supreme Court, U.S.
FILED
MAR 30 1984
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PHYLLIS A. ANDERSON,

Petitioner,

v.

CITY OF BESSEMER CITY, etc.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

J. LEVONNE CHAMBERS
JONATHAN WALLAS
JOHN NOCKLEBY
Chambers, Ferguson, Watt,
Wallas, Adkins & Fuller, P.A.
Suite 730
951 S. Independence Blvd.
Charlotte, North Carolina 28202
(704) 375-8461

JACK GREENBERG
O. PETER SHERWOOD
ERIC SCHNAPPER*
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

Counsel for Petitioner

*Counsel of Record

116 pp

QUESTION PRESENTED

1. Did the court of appeals err in holding that a prima facie case of employment discrimination on the basis of sex may be rebutted by proof that the responsible personnel officials permitted their wives to work?

2.* Does Rule 52(a), F.R.C.P., forbid the courts of appeals from reviewing the credibility findings of a trial judge?

3.** Did the court of appeals exceed

---

*/ The same question is also raised by the pending petition for writ of certiorari in Miller v. Mercy Hospital, No. 83-___.

**/ The Fourth Circuit has found "clear error" in every Title VII appeal since Pullman-Standard v. Swint, 456 U.S. 273 (1982) in which the district court ruled in favor of the plaintiff. Three of those cases are already pending before this Court. Miller v. Mercy Hospital, No. 83-___; Cooper v. Federal Reserve Bank, No. 85-185; Cuthbertson v. Biggers Brothers, Inc., see n.12, infra.

its authority under Rule 52, F.R.C.P., in holding that there was insufficient evidence to support the trial court's finding of hiring discrimination on the basis of sex, where the record showed and the trial court found that:

(i) a member of the hiring committee stated that he had voted not to hire petitioner because he believed it would be "real hard" for "a lady" to do the job;

(ii) the chair of the hiring committee testified that petitioner was "the better applicant";

(iii) a member of the hiring committee deliberately solicited applications only from men.

PARTIES

The parties to this proceeding are Phyllis A. Anderson and the City of Bessemer City, North Carolina.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties	iii
Table of Authorities	vi
Opinions Below	2
Jurisdiction	2
Statute and Rule Involved	3
Statement of the Case	4
Reasons for Granting the Writ	12
(1) Certiorari Should Be Granted to Review the Fourth Circuit Practice in Title VII Case of Finding "Clear Error" in All Lower Court Findings of Employment Discrimination	12
(2) Certiorari Should Be Granted To Review The "Working Wife" Defense Established by the Court of Appeals	29
(3) Certiorari Should Be Granted to Resolve A Conflict Among The Circuits Regarding Whether Rule 52(a), F.R.C.P., Forbids Appellate Review of Trial Court Credibility Decisions	38
Conclusion	40

APPENDIX	Page
District Court Memorandum of Decision, September 16, 1982	1a
District Court Findings of Fact and Conclusions of Law, February 16, 1983	6a
Judgment, February 16, 1983	33a
Opinion of the Court of Appeals, September 19, 1983	35a
Order of the Court of Appeals Denying Rehearing and Rehearing En Banc, November 4, 1983	66a

TABLE OF AUTHORITIES

	Page
Cases	
Brady v. Thurston Motor Lines, 33 FEP Cases 1367 (4th Cir. 1983)	14
Castaneda v. Partida, 430 U.S. 482 (1977)	37,38
Cline v. Roadway Express, Inc., 689 F.2d 481 (4th Cir. 1982)	16
Cooper v. Federal Reserve Bank, No. 83-185	i
Cuthbertson v. Biggers Brothers, 702 F.3d 454 (4th Cir. 1983)	8,15,26
EEOC v. Federal Reserve Bank, 698 F.2d 633 (4th Cir. 1983)	14,15
Fink v. Western Electric Co., 708 F.2d 909 (4th Cir. 1983)	16
Guzman v. Pichirilo, 369 U.S. 698 (1962)	23
Lewis v. Central Piedmont Community College, 689 F.2d 1207 (4th Cir. 1982)	14,15,25
Lilly v. Harris-Teeter Supermarket, 720 F.2d 326 (4th Cir. 1983)	14

	Page
Lindsay v. Mississippi Research, etc., Center, 652 F.2d 488 (5th Cir. 1981)	28
Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978)	35
Lovelace v. Sherwin Williams Co., 681 F.3d 230 (4th Cir. 1982)	16
Miller v. Mercy Hospital, 720 F.2d 356 (4tn Cir. 1983)	i,14,26
Patterson v. Greenwood School District No. 50, 696 F.2d 293 (4th Cir. 1982)	14
Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130 (5th Cir. 1981)	28
Pullman-Standard v. Swint, 456 U.S. 273 (1982)	i,13,14,17, 27,28,29
Rohde v. K.O. Steel Castings, 649 F.2d 317 (5th Cir. 1981)	28
Smallwood v. United Airlines, (4th Cir., February 28, 1984)	16
United States v. Yellow Cab Co., 338 U.S. 338 (1949)	25

	Page
Statutes and Rules	
28 U.S.C. § 1254(1)	3
29 U.S.C. § 621	15
42 U.S.C. § 2000e	i,15
42 U.S.C. § 2000e-2(a)	3
Rule 52, Federal Rules of Civil Procedure	i,ii,4,12, 13,16,23,25, 27,28,29,39
Other Authorities	
S. Casteras, The Substance or The Shadow -- Images of Victorian Womanhood (1982)	34
E. Flexner, Century of Struggle (1982)	34
Wright and Miller, Federal Practice and Procedure (1971)	16
Statistical Abstract of The United States, 1982-83	35

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

PHYLLIS A. ANDERSON,

Petitioner,

v.

CITY OF BESSEMER CITY, etc.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioner Phyllis Anderson respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on September 19, 1983.

OPINIONS BELOW

The decision of the court of appeals is reported at 717 F.2d 149, and is set out at pp. 35a-65a of the Appendix. The order denying rehearing, which is not reported, is set out at p. 66a. The district court's Memorandum of Decision of September 16, 1982, which is not reported, is set out at pp. 1a-5a of the Appendix. The district court's Findings of Fact and Conclusions of Law, which are reported at 557 F. Supp. 412, are set out at pp. 6a-32a of the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1983. A timely petition for rehearing was filed, which was denied on November 4, 1983. On January 25, 1984, the Chief Justice granted an order extending the date on

which the petition for writ of certiorari was due until April 2, 1984. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

Section 703(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a) provides:

> It shall be an unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status

> as an employee, because of such individual's race, color, sex, or national origin.

Rule 52(a), Federal Rules of Civil Procedure, provides in pertinent part:

> In all actions tried upon the facts without a jury or with an adisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. ...

STATEMENT OF THE CASE

On May 18, 1981, petitioner commenced this action in the United States District Court for the Western District of North Carolina. Her complaint alleged that the

defendant City of Bessemer City had refused to hire her as the city Recreation Director because of her sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et. seq. Petitioner had previously filed a charge of discrimination with the Equal Employment Opportunity Commission, which had issued a Determination finding reasonable cause to believe that the defendant had engaged in discrimination on the basis of sex.

The case was heard at a non-jury trial in September, 1982. Certain basic facts were not disputed. In the spring of 1975 the mayor of Bessemer appointed a five member committee to select a new recreation director for the city. One of the committee members, Josiah Butler, personally solicited applications from four male applicants, including both of the men who were eventually offered the position. Butler

did not, however, solicit applications from any women, although he acknowledged knowing at least two women who were better qualified then the four men whom he persuaded to apply. The committee also placed an advertisement for the position in the local newspaper. Petitioner was the only woman who submitted an application for the job.

The hiring committee did not establish prior to its selection decisions any standards or guidelines, written or otherwise, for choosing the Recreation Director, other than that the Director would have to live within the City of Bessemer. Eight individuals applied for the position, and all eight were interviewed by the committee on the same day. The committee concluded that only three of the applicants were qualified for the position -- petitioner, Donald Kincaid, and Burt Broadway. The

committee initially preferred Broadway, but decided not to offer him the position when he declined to move to Bessemer. A majority of the committee then voted to offer the job to Kincaid, who accepted the position.

The trial presented conflicting evidence on three critical issues. First, petitioner claimed that she was better qualified than Kincaid for the post of Recreation Director. One committee member testified that petitioner was better qualified; other members stated they preferred Kincaid, in part because one believed it would be "real hard" for "a lady" to do the job. (See p. 30, infra). Second, petitioner was asked if her husband would approve of her seeking and taking the job. The committee members disagreed as to whether male applicants were asked if their wives approved of the job. (See p. 22,

infra.) Third, petitioner asserted that the committee had manipulated its hiring standard, first emphasizing experience over education, and then doing precisely the opposite, in order to assure the selection of a man.

The District Court resolved each of these factual disputes in favor of plaintiffs. In a Memorandum Decision of September 16, 1982, followed by lengthier Findings of Fact and Conclusions of Law filed February 16, 1983, the trial judge held that petitioner was better qualified than Kincaid,[1/] that only petitioner was asked questions about whether her spouse approved of her taking the job,[2/] and that the committee had indeed manipulated its standards

---

1/ 4a, 15a, 19a, 26a, 29a.

2/ 4a, 12a, 21a, 25a, 26a.

to prevent the selection of a woman.[3/] The district court emphasized that petitioner had extensive prior experience working as a recreation director, a music director, and an elementary school teacher, as well as experience in bookkeeping, recruiting and supervising of subordinates, public speaking and fundraising.[4/] Kincaid had none of this work experience; he had graduated from college only nine months before the interview, and had worked in the interim for a finance company.[5/] The ostensible reason for hiring Kincaid was that, although both he and petitioner possessed college degrees, and both had taken physical education

---

3/ 3a.

4/ 4a, 16a,-18a.

5/ 18a.

courses, his degree was in physical education, whereas petitioner's degree was in elementary education.[6/] The district judge concluded that this was a pretext, and that petitioner had been rejected because of her sex.[7/]

On appeal the Fourth Circuit reversed as "clearly erroneous" each of the controverted factual findings of the district court. The lower court's decision that petitioner was better qualified than Kincaid, that petitioner alone was asked questions about her family, that the committee manipulated the hiring standards, that the reasons for hiring Kincaid were pretextual, all were held to be "clearly erroneous", as was the district judge's ultimate conclusion that petitioner was

---

6/ 3a, 15a.

7/ 2a, 7a, 23a, 26a, 27a.

denied the position of Recreation Director because of her sex.[8/] The district court had also relied on uncontroverted evidence that one member of the committee had solicited applications only from men, and that another member had acknowledged that his preference for Kincaid was based on a conviction that it would be difficult for "a lady" to do the job. (See p. 30, infra). The court of appeals held that, as a matter of law, that evidence had been rebutted by proof that the male committee members were married to women who had held jobs outside the home. (61a).

A timely petition for rehearing and suggestion for rehearing en banc was denied on November 4, 1983.

8/ 47a, 51a, 55a-56a, 59a.

REASONS FOR GRANTING THE WRIT

(1) Certiorari Should Be Granted to Review the Fourth Circuit Practice in Title VII Cases of Finding "Clear Error" in All Lower Court Findings of Employment Discrimination

The court of appeals' decision in this case is an object lesson in the problems that arise when an appellate court ignores the limited scope of review established by Rule 52 of the Federal Rules of Civil Procedure. The appellate court below "edited" the trial transcript to delete the critical testimony relied on by the district court,[9/] disregarded the trial court's credibility findings,[10/] and having done so concluded that the lower court's finding of intentional discrimination, as well as

---

9/ See pp. 19-20, infra.

10/ See p. 39, infra.

every one of its critical subsidiary findings, were "clear error". This disregard of Rule 52 would warrant summary reversal even if it were an isolated incident. Trout v. Lehman, ___ U.S. ___ (No. 83-706).

But the de novo review apparent on the face of the panel's opinion is no abberation; in the Fourth Circuit such appellate trials de novo are the normal practice in Title VII cases. This Court's decision in Pullman-Standard v. Swint, 456 U.S. 273 (1982), reemphasized Rule 52's requirement that factual findings be reversed on appeal only if clearly erroneous, and directed that that standard be applied in particular to findings of fact regarding the presence of discriminatory motivation. But appellate findings of "clear error," which Swint contemplated would be the exception, are in the Fourth Circuit rule. Since April 27,

1982, the date on which Swint was decided, the Fourth Circuit has found clear error in every case in which a district court had found intentional employment discrimination on the basis of race or sex. In most of those cases all findings of discrimination, both as to individuals and as to the plaintiff class, were reversed as "clear error".[11/] In every other Title VII case at least one or more of the findings of discrimination was held on appeal to be "clear error".[12/] One three judge panel,

---

11/ EEOC v. Federal Reserve Bank, 698 F.2d 633 (4th Cir. 1983) cert. granted ____ U.S. ____ (1983); Miller v. Mercy Hospital, 720 F.2d 356 (4th Cir. 1983), cert. pending, No. 83-____; Lewis v. Central Piedmont Community College, 689 F.2d 1207 (4th Cir. 1982), cert. denied, ___ U.S. ___; Patterson v. Greenwood School District No. 50, 696 F.2d 293 (4th Cir. 1982); and the instant case.

12/ Lilly v. Harris-Teeter Supermarket, 720 F.2d 326, 338 (4th Cir. 1983); Brady v. Thurston Motor Lines, 33 FEP Cases 1367,

which reviewed four unrelated Title VII cases involving two lower court findings of classwide discrimination and seven lower court findings of individual instances of discrimination, held that every single one of these findings was "clear error".[13/] The treatment of age discrimination cases[14/] is essentially similar. Since Swint the Fourth Circuit has considered five such cases involving 21 different findings of

---

12/ continued

1378 (4th Cir. 1983); Cuthbertson v. Biggers Brothers, 702 F.2d 454, 462, 463, 464 (4th Cir. 1983), cert. pending. The petition for a writ of certiorari in Cuthbertson, which has not yet been docketed, is in the custody of the Chief Deputy Clerk, Mr. Lorson.

13/ EEOC v. Federal Reserve Bank, Cuthbertson v. Biggers Brothers, Lewis v. Central Piedmont Community College, and the instant case.

14/ See 29 U.S.C. § 621 et. seq.

discrimination.[15/] Two of these involved jury verdicts, which are subject to a standard of review even more stringent than Rule 52.[16/] The Fourth Circuit reversed as "clear error" 20 of the 21 findings of age discrimination. Overall, out of 13 appeals since Swint in which the plaintiffs

---

15/ Smallwood v. United Airlines, Nos. 82-2115 and 82-2116, slip opinion February 28, 1984 (finding for individual plaintiff "clear error"); EEOC v. Western Electric Co., Inc., 713 F.2d 1011, 1016, 1019 (4th Cir. 1983) (finding of pattern and practice and of 16 instances of discrimination all "clear error"); Fink v. Western Electric Co., 708 F.2d 909 (4th Cir. 1983) (jury verdict for individual plaintiff overturned); Lovelace v. Sherwin Williams Co., 681 F.2d 230 (4th Cir. 1982) (jury verdict for individual plaintiff overturned); Cline v. Roadway Express, Inc., 689 F.2d 481 (4th Cir. 1982) (finding for individual plaintiff not clearly erroneous).

16/ 9 Wright and Miller, Federal Practice and Procedure, § 2585, p. 730 (1971).

prevailed below in an employment discrimination case, the Fourth Circuit has found "clear error" in 12. There is, on the other hand, no reported Fourth Circuit opinion since Swint finding clear error in a trial court employment discrimination decision favorable to a defendant.

The particular circumstances of the instant appeal confirm the apparent Fourth Circuit disregard of Rule 52 suggested by this pattern of reversals. The district court in the instant case found that the Bessemer City officials had intentionally rejected petitioner because of her sex,[17/] and based that conclusion, inter alia, on express subsidiary findings that petitioner was better qualified than the man who was

---

17/ 2a, 7a, 23a, 26a, 27a.

hired,[18] that petitioner was asked questions about her personal life that were not asked of the male applicants,[19] and that the city officials manipulated the job requirements of the position for which petitioner applied in order to justify the selection of a man.[20] The court of appeals held as to each of these findings that it was "clearly erroneous"[21] or that there was "nothing in the record to support" it.[22]

After a detailed review of the evidence adduced at trial, the district judge

---

18/ 4a, 15a, 19a, 26a, 29a.

19/ 4a, 12a, 13a, 21a, 25a, 26a.

20/ 12a; see also 3a, 22a, 27a.

21/ 47a, 55a-56a, 59.

22/ 51a.

expressly concluded that petitioner "was the best qualified candidate" (4a). The court of appeals reached the opposite concusion, holding that the evidence showed that petitioner was not better qalified than the man who was hired. (55a-56a). The court of appeals expressly quoted and relied on the trial testimony of the chair of the hiring committee. The pertinent portion of Boone's testimony, as "edited" and quoted by the Fourth Circuit, reads:

> Q How about art, do you believe either of them had qualifications superior to the other ...? As to the subject of art specifically?
>
> A. No.

(54a). The Fourth Circuit emphasized, "[E]ven Boone specifically denied that Anderson was better qualified." (Id.) The actual transcript, on which the trial judge relied, however, contains precisely the

testimony which the Court of Appeals complained was lacking:

> Q. How about art, do you believe either one of them had qualifications superior to the other?
>
> A. That wasn't the basis of the hiring of a recreation [director] ...
>
> Q. What you were looking for in qualifications as a member of the committee...
>
> A. <u>As an all around Director, I felt like Phyllis was the better applicant</u>
>
> Q. As to the subject of art specifically?
>
> A. No. 23/

23/ Joint Appendix, No. 83-1278 (4th Cir.), p. 149 (Emphasis added) (hereinafter cited as J.A.). See also id. at 138-39:

> "Q. Who was best qualified for the position of Recreation Director in your opinion?
>
> "A. In my personal opinion, I felt Phyllis Anderson was the best qualified, and that's all-around qualified.
>
> "Q. Would you explain what that was based on?

> "A. Her past experience, her educational background.

The transcript was "edited" by the court of appals itself to omit the critical testimony; the defendant never offered in its appellate briefs any such "edited" version of the proceedings.

The district judge also held that plaintiff had been asked questions regarding her personal life, particularly about whether her husband would approve of her seeking or taking the job for which she was applying, that were not asked of male applicants.24/ The district court concluded that this questioning "suggested that a woman ought to be at home instead

---

23/ continued

24/ See n.2, supra.

of working." (4a).[25] The court of appeals acknowledged that there was "conflicting testimony" on this issue (44a); nevertheless, it overruled as "clearly erroneous" the lower court finding that petitioner was subject to inquiries not made of male applicants. (59a). The issue of whether or not questions about spousal approval were asked of male applicants involved a direct conflict in the testimony. The committee chair insisted that no such questions had been asked of the male applicants.[26] Another committee member, on the other hand, testified that the same

---

25/ In addition, the district court held that petitioner, but not the male applicants, was asked if she realized the position involved working at night and traveling throughout the county. (4a, 12a, 13a, 21a). The Fourth Circuit also reversed this finding as "clearly erroneous." (59a).

26/ J.A. 136-37, 154-55.

question was "in a sense" asked of Donald Kincaid, although apparently not of the other male applicants.[27] Such conflicts in the trial testimony must ordinarily be resolved by the trial judge, since Rule 52 admonishes that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses". This Court emphasized in Guzman v. Pichirilo, 369 U.S. 698 (1962), that "under this rule ... [a] refusal to credit the uncorroborated testimony of [a witness], who obviously was not disinterested in the outcome of the litigation, would not be considered clearly erroneous." 269 U.S. at 702.

The district court in the instant case also held that the hiring committee had manipulated the selection criteria to

---

27/ J.A. 190.

assure the selection of a man. In justifying their initial prefrence for Bert Broadway over petitioner, the officials explained that, although Broadway, unlike Petitioner, had no college degree, he had extensive teaching experience; the subsequent selection of Kincaid rather than petitioner was defended on the ground that although, unlike petitioner, Kincaid had no teaching experience, he had a college degree in physical education. The district judge concluded:

> the committee emphasized either experience or education, depending on which criteria justified the choice of a particular male candidate. (27a; see also 22a).

The court of appeals insisted there was "simply nothing in the record to support" this conclusion. (51a). In reality the defendant's shifting accounts of its hiring standards provided support both for the trial court's finding that the explana-

tions were "pretextual" (26a), and for the appellate court's contrary conclusion. In such cases Rule 52 rquired that consideration be given to the ability of the trial court to assess the credibility of the city officials. "Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them." United States v. Yellow Cab Co., 338 U.S. 338, 341 (1949).

The decision of the court of appeals in this case to disregard the findings of the trial court were consistent with the general practice of the Fourth Circuit since Swint. In Lewis v. Central Peidmont Community College, 689 F.2d 1207 (4th Cir. 1982), the district court held that the black plaintiff, who had both a college degree and relevant practical experience, was more qualified than the white who,

though lacking both, was hired. 689 F.2d at 1210. There, as here, the Fourth Circuit held the district court finding was "clearly erroneous". Id. In Miller v. Mercy Hospital, 720 F.2d 356 (4th Cir. 1983), certiorari pending, the district court which sustained the plaintiff's discrimination claims found the testimony of the key defense witnesses vacillating, vague, and undeserving of belief. 720 F.2d at 367. There, as here, the Fourth Circut found the lower court's credibility determinations to be "clearly erroneous." 702 F.2d at 375-68. In Cuthbertson v. Biggers Brothers, Inc., 702 F.2d 454 (4th Cir. 1983), certiorari pending, the district court concluded that the defendant had manipulated its hiring criteria to assure the selection of whites as salesmen. 702 F.2d at 457. The record showed that the

defendant had never hired a black salesman prior to 1976, that the firm's officials had announced "the time was not right" to hire black salesmen, and that the firm's president had stated he "wouldn't let a black man sell a dog for him".[28/] There, as here, the fourth Circuit concluded that was insufficient evidence to support a finding of racial discrimination. 702 F.2d at 461.

This court recognized in Pullman-Standard v. Swint that the extent of compliance with Rule 52 must be ascertained by examining the actual decision of a court of appeals, not by reliance on a pro forma recitation of the "clearly erroneous" standard. 456 U.S. at 291-93. The Fifth

---

28/ Petition for Writ of Certiorari, pp. 7-8. (See n.12, supra.)

Circuit "ultimate fact" doctrine condemned in Swint was a relatively minor deviation from Rule 52 compared with the practice of the Fourth Circuit described above. In the Fifth Circuit prior to Swint, district court decisions in employment discrimination cases were frequently upheld.[29/] In the Fourth Circuit since Swint, at least in cases in which the plaintiff prevailed below, that virtually never occurs. Today in Maryland, Virginia, West Virginia and the Carolinas the role of federal district judges in many employment discrimination cases is merely to compile the record on which Fourth Circuit will base its de novo determination. In any case in which a

---

29/ See, e.g., Payne v. McLemore's Wholesale & Rental Stores, 654 F.2d 1130 (5th Cir. 1981); Lindsay v. Mississippi Research, etc., Center, 652 F.2d 488 (5th Cir. 1981); Rohde v. K.O. Steel Castings, 649 F.2d 317 (5th cir. 1981).

district judge decides to rule for the plaintiffs, the drafting of the findings of fact and conclusions of law required by Rule 52(a) is generally pointless, since such findings ordinarily carry no weight on appeal. In the Fourth Circuit today, as in the Fifth Circuit prior to Swint, the pro forma appellate references to the "clearly erroneous" rule cannot obscure the very different standard of review which is in fact being applied.

(2) Certiorari Should Be Granted to Review the "Working Wife" Defense Established by the Court of Appeals

The district court finding of intentional discrimination was based on several subsidiary findings the accuracy of which were not questioned by the court of appeals. First, Frank Nichols, one of the hiring committee members, testified at trial that one of the reasons he opposed

hiring petitioner was that he believed "it would have been real hard" for "a lady" to do the job for which she had applied. (21aa)[30/] Second, Nichols testified, with regard to the fact that the position required evening work, that he thought "my

---

30/ The full colloquy was as follows:

"Q. Mr. Nichols, if you remember, why did you personally prefer Donald Kincaid over Phyllis Anderson as your selection for this position?

"A. I figured he was better qualified.

"Q. In what sense?

"A. He had a PE degree.

"Q. Any thing else?

"A. At the time we were talking about getting this recreation program started at Bessemer City, a lady could have run the job, I'm not saying she couldn't, but it would have been real hard."

J.A. 209.

wife should be at home at night."[31/] Third, another committee member, Josiah Butler, expressly solicited applications from four male candidates, including Kincaid, but deliberately refused to solicit applications from women, although he personally knew several women who were qualified for the job.[32/] Kincaid was known to and

---

31/ The full questions and answers were as follows:

"Q. You wouldn't want your wife to have that job though, would you?

"A. No, sir, I wouldn't.

"Q. And you wouldn't want to put a lady through lining [sic] ballfields and being at the gym at night?

"A. I'm speaking personally for myself. I have three children at home, and I think my wife should be home at night."

J.A. 214.

32/ 11a, 21a, 25a, 26a.

recruited by Butler because both belonged to a club which excluded women from membership.[33/]

Although this evidence strengthened considerably petitioner's prima facie case, the court of appeals held that such direct proof of discriminatory attitudes was completely rebutted by evidence regarding the personal lives of the male members of the committee:

> This evidence ... is dispelled by other portions of the record. For example, there is nothing to show the male committee members had a bias against working women. All four testified that their wives had worked and were accustomed to being away from home during evening hours. (61a).

This passage embraced the argument expressly advanced by respondent below that the family lives of the male committee members was conclusive of the allegations

---

33/ 21a; J.A. 196.

regarding their motives.[34/]

In the view of the court of appeals, marriage to working women effectively immunized the male committee members from any charge of employment discrimination on the basis of sex. The Fourth Circuit rule apparently extends to male officials whose wives had ever worked at any time during their marriage; in this case only one of the four wives was actually employed at the time of trial,[35/] and two of the four had not worked for years.[36/] This "working wife" defense is inconsistent both with the

---

34/ Brief for Appellant, No. 83-1278, p. 35. ("[I]t is apparent from the personal circumstances of each of the four male selection committee members that none was prejudiced against female employment, or against females working at night....") (Emphasis in original).

35/ J.A. 202.

36/ J.A. 192, 222.

purposes of Title VII and with simple common sense.

The Fourth Circuit's "working wife" defense is itself based on the very type of sexual stereotyping which Title VII condemns. In early nineteenth century America, marriage to a working woman might have been the mark of an exceptionally liberated man. Not only was it then uncommon for wives to work outside the home, but in many states a married woman could neither sign an employment contract nor keep her earnings without the permission of her husband.[37/] But the legal status of married women in the United States no longer resembles that of minor children. The Fourth Circuit's assertion that the actions of the

---

37/ See E. Flexner, Century of Struggle, 8 (1959); S. Casteras, The Substance or the Shadow -- Images of Victorian Womanhood, 10-11 (1982).

wives in this case was a conclusive indicator of the motives of their husbands necessarily, if tacitly, assumes that the wives of the male committee members would not or could not have worked outside their homes unless their husbands approved. Title VII condemns precisely such "myths and purely habitual assumptions about ... wom[e]n...." Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702, 707 (1978).

The "working wife" defense would virtually nullify Title VII's prohibition against employment discrimination on the basis of sex. Today over half of all married women are working outside the home;[38/] the vast majority of all married women have held such jobs at some point

---

38/ Statistical Abstract of the United States 1982-83, p. 382, table no. 638.

after their weddings. Thus virtually every married male personnel official will qualify for the "working wife" defense now recognized in the fourth Circuit.

The courts of appeals' "working wife" defense is also at odds with this Court's decision in Castaneda v. Partida, 430 U.S. 482 (1977). In Castaneda the district court had held that a prima facie case of discrimination against Hispanics in the selection of grand juries could be rebutted by evidence that a majority of the jury commissioners were themselves Mexican-American. This Court reversed, holding that "[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." 430 U.S. at 499. In light of the decision in Castaneda, the evidence in this case

could not have been rebutted by evidence that four members of the hiring committee were themselves working women; the mere fact that the male members of the committee were married to working women is of considerably less probative value than the evidence rejected in Castaneda itself.

Justice Blackmun's admonition in Castaneda regarding the many facets of human motivation applies with particular force to the Fourth Circuit's "working wife" defense. The husband of a working woman may have protested, indignantly but in vain, her decision to seek employment, or may have acquiesced in a decision that offended his personal views about marriage only because the couple was in financial difficulty. The actual experience of being married to a working woman might have aggravated a husband's resistance to such employment, or created prej-

uoices where none existed before. In the instant case two of the wives had held traditional women's jobs, school teacher[39/] and nurse;[40/] a husband who did not object to such employment might nonetheless resist hiring a woman for a position that had in the past ordinarily been held by men. In short, the fact that a personnel official's marriage to a working wife, although now a virtually conclusive defense in the Fourth Circuit to proof of employment discrimination on the basis of sex, is in reality entirely devoid of evidentiary significance.

(3) Certiorari Should Be Granted To Resolve A Conflict in The Circuits Regarding Whether Rule 52(a), F.R.C.P, Forbids Appellate Review of Trial Court Credibility Determinations

The district judge expressly relied on the credibility of the witnesses in resolv-

---

39/ J.A. 192.

40/ J.A. 222.

ing the conflicting testimony of city officials regarding whether petitioner was asked personal questions not asked of the male applicants. (12a-13a). The trial judge also expressly relied on credibility in reaching his overall conclusion that petitioner was denied employment because of her sex. (7a). The court of appeals reversed both credibility determinations.

The courts of appeals are sharply divided regarding whether trial court credibility determinations can be reviewed on appeal, or must be accepted as binding on the appellate courts. Seven circuits have held that no such appellate review is permitted by Rule 52(a). Four circuits, including the Fourth, permit such review, although applying widely divergent standards.

The conflict among the circuits on this important issue is described in detail

in the Petition for Writ of Certiorari in Miller v. Mercy Hospital, No. 83-____. Certiorari should be granted to resolve that question.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

J. LEVONNE CHAMBERS
JONATHAN WALLAS
JOHN NOCKLEBY
Chambers, Ferguson, Watt,
Wallas, Adkins & Fuller, P.A.
Suite 730
951 S. Independence Blvd.
Charlotte, North Carolina
28202
(704) 375-8461

JACK GREENBERG
O. PETER SHERWOOD
ERIC SCHNAPPER *
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

Counsel for Petitioner
* Counsel of Record

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-81-204-M

PHYLLIS A. ANDERSON, Plaintiff, -vs- CITY OF BESSEMER CITY, NORTH CAROLINA, Defendant.	)	MEMORANDUM OF DECISION

Jonathan Wallas and Ronald L. Gibson, Chambers, Ferguson, Watt, Wallas, Adkins & Fuller, P.A., 951 South Independence Boulevard, Charlotte, North Carolina 28202, counsel for plaintiff.

Philip M. Van Hoy, 400 South Tryon Street, Suite 3022, Charlotte, North Carolina 28285, and Arthur C. Blue, III, Whitesides, Robinson and Blue, P.A., 246 West Main Avenue, Gastonia, North Carolina 28052, counsel for defendant.

Before James B. McMillan, District Judge

This case was tried without a jury on Monday and Tuesday, September 13 and 14, 1982. The decision was taken under advisement for a more deliberate review of the evidence and file. I have reached the following conclusions:

1. The plaintiff was denied equal opportunity to compete for the job of Recreation Director for the defendant municipal corporation, and was denied the job because of her sex.

2. The defendant's explanations for the choice, though valid on their face, are pretextual.

3. Plaintiff has carried the burden throughout of demonstrating that her rejection for the job was because of her sex.

4. Plaintiff is entitled to compensation for loss of income to the date of the trial, but is not entitled to a declaratory judgment and does not seek reinstatement. I have great doubts that reinstatement would be an appropriate remedy under the circumstances.

In arriving at the above conclusions, I have considered a number of pertinent facts, including the following which I have not attempted to list in order of relative importance, and which do not constitute any exclusive statement of the reasons for the decision:

(a) There were no objective predetermined standards for the selection.

(b) Each member of the selection commission followed his or her own nose in making the decision.

(c) Formal education in the specific field of physical education, which is the winning candidate's principal advantage over the plaintiff, had never been a prescribed nor agreed required qualification; in fact, the candidate (not selected) whom most of the commission said had been their original number one choice did not have formal education in physical education.

(d) The rationale of the four male members of the committee for their selection was based predominantly upon the winning candidate's formal degree and his perceived experience in

taking part in and training for competitive athletics. Competitive sports is only one of five major goals listed in the later-developed program (plaintiff's exhibits 8 and 15) which is the only written description of the duties of the job. (This description was apparently prepared after the selection had been made.)

(e) In the interviews with applicants, plaintiff was asked questions which implied substantial doubt that a woman ought to have a job which required night work and which suggested that a woman ought to be at home instead of working. Men were not asked similar questions.

(f) Plaintiff had already obtained a state certificate as a certified Recreation Director; the successful candidate obtained his certificate after and by virtue of his selection by the committee to be the Director of the Bessemer City Recreation Commission.

(g) Neither the plaintiff nor the successful candidate participated in varsity college athletics. Plaintiff had extensive experience in positions of leadership and athletics in high school, and in community activities of all kinds following college, and had had two years of active experience in running a recreation program. She is skilled in music, dance, directing and playing sports, band activity, speaking, guidance leadership, community affairs, financial management and education. She was the best qualified candidate.

Nothing in the above recital is intended to be uncomplimentary to the character and capacity of Mr. Kincaid, the successful candidate, nor in derogation of his apparent success to date in his work as Recreation Director.

If the parties can agree upon a solution of the case based upon these findings, they are requested to let the court know by October 4, 1982. If they have not reached an agreement by that time, plaintitff's counsel will be requested to draft and submit a somewhat enlarged version of this memorandum in the form of proposed findings of fact, conclusions of law, and an appropriate judgment.

This 16 day of September, 1982.

James B. McMillan
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-81-204-M

PHYLLIS A. ANDERSON,	)	
	)	
Plaintiff,	)	FINDINGS OF FACT
	)	AND
-vs-	)	CONCLUSIONS OF LAW
	)	
CITY OF BESSEMER CITY, NORTH CAROLINA,	)	
	)	
	)	
Defendant.	)	

Jonathan Wallas and Ronald L. Gibson, Chambers, Ferguson, Watt, Wallas, Adkins & Fuller, P.A., 951 South Independence Boulevard, Charlotte, North Carolina 28202, counsel for plaintiff.

Philip M. Van Hoy, Siegel, O'Conner & Kainen, P.C., 400 South Tyron Street, Suite 3022, Charlotte, North Carolina 28285; Henry Whitesides and Arthur C. Blue, III, Whitesides, Robinson and Blue, P.A., 246 West Main Avenue, Gastonia, North Carolina 28052, counsel for defendant.

Before James B. McMillan, District Judge

PRELIMINARY STATEMENT

This case was tried without a jury on September 13 and 14, 1982. On September 16, 1982, this court filed a memorandum of decision finding that "plaintiff was denied

Recreation Director for the defendant municipal corporation, and was denied the job because of her sex." The court supported this finding with a review of the key evidence and a resolution of the central issues of credibility, and requested that plaintiff's counsel draft "an enlarged version of this memorandum in the form of proposed findings of fact, conclusions of law, and an appropriate judgment."

On November 15, 1982, the court received plaintiff's proposed findings and conclusions. On November 18, 1982, the court invited defendant to respond by pointing to the portions of the proposed findings not supported by the record, by providing references to the transcript and exhibits which support the defendant's position, and by suggesting language which should be substituted for that used by the

plaintiff. On December 10, 1982, defendant filed a 15-page response to the proposed findings, including helpful references to the transcript.

Having reviewed the trial transcript and exhibits and having considered all of the evidence, and the proposals and arguments of counsel for both parties, the court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On May 18, 1981, plaintiff Phyllis A. Anderson filed this suit against defendant, Bessemer City, alleging violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. for discrimination on the basis of sex.

2. Plaintiff is a female citizen and resident of Bessemer City, North Carolina. The defendant, City of Bessemer City, is a North Carolina municipal corporation.

3. During February or early March, 1975, the position of Recreation Director for Bessemer City became vacant. Defendant advertised the position through the local newspaper, the Gastonia Gazette, and by word of mouth.

4. The Mayor of Bessemer City appointed a committee to select a new Recreation Director. The committee consisted of Auduie Boone, Josiah Butler, William McClellan, Frank Nichols, and Timothy Helms. Ms. Boone, the only woman on the committee, was chairperson.

5. Eight persons applied for the position; plaintiff Anderson was the only woman applicant. She submitted a letter of application and a resume to the City Manager, William Metcalf, on March 16, 1975.

6. Some time before applying for the job, plaintiff talked to Neil Barnes, who was then the Superintendent of Water Works for the city, who told her that the position was "wrapped up" by another candidate. In response to that conversation, plaintiff included the following paragraph in her application letter:

> I realize you will probably be giving stronger consideration for a male to fill this position. In this light, I would request you review all qualifications equally, realizing women are assuming positions of leadership and responsibility in industry and government equal to those held by men.

Before submitting her application, Anderson also talked to Boone who told her that anyone could apply for the job (TT 5).

7. Of the remaining seven applicants, one man, Bert Broadway, was asked by Butler to apply. Another applicant, Donald Kin-

caid, was notified by Butler that the position was vacant (TT 82). Butler asked two other males, who he believed were qualified, to apply, but they declined (TT 106). Butler did not contact either of two women whom he believed to be qualified to ask them to apply (TT106).

8. The committee interviewed all eight applicants on March 25, 1975. Each member of the committee had access to the application of each candidate. The committee received no written guidelines from the defendant for selecting the Recreation Director. No description of job duties was provided either the committee or the candidates. The committee never formulated its own selection criteria except to agree informally that the person selected must live within the city or be willing to relocate there. Each committee member had one vote.

9. During plaintiff's interview with the committee, she was asked about the program she would implement as Recreation Director. She was also asked (a) if she realized there would be night work involved; (b) if she realized there could be travel throughout the county and meetings with other directors; and (c) how her husband felt about her applying for the job (TT 8). No other candidate was seriously asked a similar question (TT 48, 65). After becoming annoyed from hearing these questions asked only of Anderson, Boone facetiously remarked to Kincaid "and your new bride won't mind?" (TT 66).

The court has carefully considered the conflicting testimony of Nichols that all candidates were asked about night work (TT 119). Kincaid could not remember being asked a question about night work, although he remembered commenting on the subject (TT

77); Butler remembered the question being asked of Anderson and of Kincaid "in a way" (TT 101). After hearing live testimony and considering the credibility of the different witnesses, this court concludes as a fact that no serious question about night work or reaction of spouses was asked of any candidate besides the plaintiff.

Further, the plaintiff did not begin the interview by stating that the committee would not select her because she is a woman. No committee member besides Helms remembered such a statement and plaintiff explicitly denied making the statement (TT 28).

10. After reviewing the applications and completing the interviews, the committee generally considered Bert Broadway to be the most qualified applicant. Broadway was a Recreation Director in Cramerton and had taken five electives in physical

education during college (TT 93, exhibit 19). However, Broadway was eliminated from consideration during the interview because he said that he would not relocate to Bessemer City (TT 94).

11. After Broadway was eliminated, the only two candidates considerd by the committee to be qualified were Anderson and Kincaid (TT 100, 120, 131, 61). The remaining candidates were men who lived in the community, but had only participated in athletics -- they had no educational training or experience to prepare them for the position (TT 100, 131). The vote was 4-1 for Kincaid; the four male members of the committee voted for Kincaid; Ms. Boone voted for the plaintiff. Kincaid was offered and accepted the job.

12. Shortly after Kincaid's selection, Boone told the plaintiff that she

thought plaintiff was the best qualified candidate and that the committee members had chosen Kincaid because he was male. Plaintiff then filed a charge of discrimination with the Equal Employment Opportunity Commission on March 31, 1975. A notice of right-to-sue was issued February 19, 1981, and plaintiff initiated this proceeding within ninety days of her receipt of that notice.

13. At trial, the male committee members said that they chose Kincaid over Anderson because he was more qualified because of his educational background. This court finds as a fact that plaintiff was more qualified for the job of Recreation Director based on the totality of her educational, employment, and recreation experience.

(a) While no job requirements were provided to the committee for making their selection of Recreation Director, this court finds from

the testimony of the committee members at trial that the job of Recreation Director was to create and implement a well-rounded recreation program for all citizens in the community. This job included a wide range of duties such as organizing and directing programs in athletics, art, music, dance, drama, and crafts; teaching and communicating with persons of all ages, backgrounds, and interests; managing community facilities; recruiting and selecting personnel; developing budgets and handling funds; and planning and implementing future programs (TT 49, 79; exhibit 8). There was no educational requirement for the job; rather, the committee was searching for the person with the best background to perform the varied duties of the position (TT 53,115).

(b) In March, 1975, when the selection was made, plaintiff was a 39-year-old woman, in good health, with a 1973 B.A. degree from Sacred Heart College in elementary education, and nearly twenty years of experience in various jobs, civic activities and recreation. In 1973-74, plaintiff was a third grade teacher in the Carr School in Dallas; she also had ten years of experience in substitute teaching in all grades in the Gaston County public schools. As part of her duties as a teacher she taught her own physical education classes, planned activities and trips, collected and budgeted money, and communicated with students, parents, and other teachers (TT 18-20).

Plaintiff was an experienced public speaker through her activities in PTA and as President of the Exchangette Club, an organization which raises money to help crippled children (TT 17, 41). She frequently planned and organized activities, recruited people to carry out projects, and handled and budgeted money through her involvement in the Exchangettes, the Jaycette Club, and the Order of the Eastern Star (TT 18, 42).

Besides her experience teaching, plaintiff had direct experience in recreation as a member of the Broughton Hospital recreation department in 1956 and 1957. There she planned and directed ballgames, dances and crafts and supervised other employees who helped implement these activities (TT 15). For this work, she received a North Carolina State Recreational Director Certificate 1957. Plaintiff personally has played softball, basketball, and soccer (TT 19) and followed her sons through sports, including attending many practices (TT 20-21). She has a basic knowledge of and enjoys all sports (exhibit 10). To receive her elementary education degree, plaintiff was required to take courses in physical education to learn how to set up activities and how to supervise them (TT 22). Plaintiff also has training in decoupage, plays the piano, and has been a music director (exhibit 10).

Plaintiff's other education includes an associate degree from Sacred Heart College in 1963 or 1964; government and history courses at Gaston College in 1973 and 1974; logic and guidance courses at Belmont Abbey College in 1974; and a Dale Carnegie course in public speaking. Plaintiff also has bookkeeping experience through her job as a receptionist for three doctors in 1959 and experience with the public as a sales clerk at Belk Stores during 1961-1963 (TT 15-16).

(c) In March 1975, Donald Kincaid was twenty-four years old, having graduated the previous spring from Appalachian State University with a B.S. degree in health and physical education. He did his student teaching at Mountain City High School in Tennessee (exhibit 11). From approximately June 1974 to March 1975 he worked in the finance department of the Commercial Credit Corporation. He also sold life insurance for a couple of months immediately following completion of his degree requirements at school. Kincaid played football, baseball, and basketball in high school; he participated in intramurals during college (TT 74, 85). He had experience coaching little league basketball in Bessemer City (TT 75). He mentioned on his resume that he enjoyed coaching, reading and music (exhibit 11).

At the time of the interview, Kincaid had no experience supervising

other employees, no experience in public speaking, and no experience in planning or directing the activities of a recreation department. He had helped Butler schedule basketball games for the little league, but he had no hands-on training or experience in creating and setting up a broad range of programs. He had no experience teaching arts, crafts or music. He had never raised money or recruited personnel. Kincaid's only experience teaching sports was the required student teaching and coaching little league basketball in the winter of 1975.

(d) On the basis of their relative qualifications, this court finds as a fact that plaintiff was more qualified than Kincaid to perform the broad range of duties required of a recreation director. She had direct experience teaching, supervising, directing programs, raising money, speaking to the public, handling budgets, and planning activities, that Kincaid did not have. Both candidates knew the rules of most sports; both had actively participated in sports. Kincaid had a degree in health and physical education; Anderson had a degree in education, for which she was required to take classes in physical education. The selection committee did not inquire into the content of either candidate's courses (TT 84, 108). While Kincaid had personally played more of the traditionally male dominated sports, Anderson had both participated in and taught a broad range of activities including sports, music, dance, and crafts. The combination of plaintiff's teaching degree, work experience, civic activities, and knowledge of recreation made her more qualified than Kincaid to perform the duties of the Recreation Director.

14. Plaintiff, the more qualified candidate, was not selected for the position of Recreation Director because of her sex. The selection committee had no standards or criteria by which to choose the new director, except for the informal residence requirement. The subjective decision making process left the committee members free to use their own biases in the selection. Defendant argues that the male committee members had experience in athletics, physical education, recreation, and government qualified them to use their own knowledge in selecting between the applicants. After considering the live testimony and reviewing the evidence, this court finds that the "knowledge" of the male members of the committee included a bias toward having a male, particularly one versed in the traditionally male-dominated sports, in the position of Recreation

Director. This bias is inferred from the following evidence:

(a) The only female candidate was asked questions about night work and the reaction of her spouse; those questions were not seriously asked of any male candidate. If the questions had been asked of all candidates, the defendant might reasonably claim that the inquiry about night work was job related. As it is, the questions imply a belief that women have family responsibilities that should keep them home at night. Plaintiff was not the only applicant with a family; Kincaid had a wife and child.

(b) Butler solicited applications from four males for the job (Kincaid, Broadway, Russ Bergman and Roy Pierson, TT 82, 99, 106). Although he knew two qualified women, he did not seek applications from either of them. Butler made an assumption that the women would not want to take a cut in pay to accept the job, and he did not make that assumption with respect to the males.

(c) Nichols testified at trial that "it would have been real hard" for a lady to have run the job (TT 120). He said that he thought "my wife should be at home at night" (TT 125).

(d) The emphasis by the male committee members on the importance of a degree in health and physical education was abandoned when they explained why Broadway was their first choice. Broadway had no degree; they found him most qualified because of his work experience (TT 115). Yet the male members of the committee downplayed the significance of experience when comparing plaintiff's teaching, supervisory, and recreation experience to Kincaid's qualifications.

(e) Both Nichols and Butler emphasized the role of the Recreation Director in organizing traditionally male-dominated sports leagues. Nichols referred to the job as "Athletic" director (TT 124, dep. p. 7). Butler wanted the baseball, football, and basketball programs to be strengthened (TT 107). When Nichols was asked about his experience with running a recreation program, he responded "We looked after the baseball football, basketball, lined the fields off, helped out at ballgames, helped officiate at basketball games, and et cetera like that" (TT 117). Neither person mentioned the broad range of recreational activities outside these sports that a director would be expected to organize and supervise.

While one committee member, Helms, claimed to have been influenced by the program Kincaid presented during the interview. McClellan testified that

Anderson and Kincaid presented very similar programs (TT 112). From the testimony of Anderson and Kincaid at trial, the court finds that there was no substantial difference between the programs offered during the interview and that this explanation is pretextual (TT 8, 79).

The male members of the committee chose Kincaid, the less qualified candidate, because he was male. The explanation offered that Kincaid was more qualified because of his degree in health and physical education is pretextual. But for the discrimination based on sex, the plaintiff would have been selected for the position of Recreation Director of Bessemer City.

15. Plaintiff suffered monetary loss as a result of the denial of the Recreation Director job. Her evidence showed that her earnings from March 1975 through trial were $65,402 while the earnings of Kincaid for the same period were $95,799.

CONCLUSIONS OF LAW

1. This action is properly before the court, the court has jurisdiction of this action under Title VII, and all procedural requirements of Title VII have been met.

2. The evidentiary standard and allocation of burden of proof applicable to this case is set forth in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), where the Supreme Court refined the basic allocation of burdens and order of presentation of proof set forth in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). Plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. If the plaintiff succeeds in proving a prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for plaintiff's rejection. 411 U.S. at 802. The ultimate burden of persuading the court that defendant discriminated against plaintiff remains with plaintiff. Burdine, 450 U.S. at 253.

3. Plaintiff's evidence satisfies her burden of showing that she applied for the position, was qualified, but "was rejected under circumstances that give rise to an inference of unlawful discrimination." Burdine, 450 U.S. at 253. Those circumstances include the gender stereotyped questions asked only of the plaintiff and the failure to solicit qualified men and women equally to apply for the position.

4. Defendant articulated a nondiscriminatory reason for failing to select plaintiff: that another candidate was better qualified because of his educational degree. Plaintiff may demonstrate that the proffered reason was not the true reason she was not selected either (1) directly, by persuading the court that a discriminatory reason more likely motivated the defendant; or (2) indirectly, by showing

that the defendant's proffered reason is pretextual. Burdine, 450 U.S. at 256; McDonnell-Douglas, 411 U.S. at 804-805.

5. The court concludes that the defendant's explanation is pretextual for the reasons set forth fully in the findings of fact. Plaintiff was more qualified than Kincaid to perform the broad range of duties required of a Recreation Director. The male members of the committee were biased toward selecting a male for the position as inferred from the questions about night work and reaction of her spouse asked only of the plaintiff, the failure to solicit qualified women to apply for the position, the perception that a woman would have difficulty in the position, and the emphasis on traditionally male-domina-

ted sports to the exclusion of recreational activities for all ages and both sexes. The male members of the committee emphasized either experience or education, depending on which criteria justified the choice of a particular male candidate.

The plaintiff carried the burden of persuasion throughout and convinced this court that but for the discrimination on the basis of sex, she would have been hired as Recreation Director. The gender biases of the male members of the committee played a substantive and decisive role in the hiring decision. Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. 274, 287 (1977).

6. Close scrutiny is required where a hiring decision is made on subjective, unarticulated criteria. In Coble v. Hot Springs School District No. 6, 682 F.2d 721 (8th Cir. 1982), the court reversed

the finding of a district court that plaintiff was not discriminated against on the basis of sex in the selection of a director of a teacher's center and remanded to the lower court with instructions to grant appropriate relief. The Eighth Circuit found that defendant's proffered explanation of lack of experience and absenteeism was pretextual and that the school district made the decision on the basis of a gender stereotype that the female teacher's family responsibility would interfere with her work performance. The court said:

> Although not illegeal per se, subjective promotion procedures are to be closely scrutinized because of their susceptibility to discriminatory abuse. The mere fact that the subjective process is intended to recognize merit does not necessarily alleviate its susceptibility to discriminatory abuse. When the evaluation is in any degree subjective and when the evaluators themselves are not members of the protected minority, the legitimacy and undis-

> criminatory basis of the articulated reason for the decision should be subject to particularly close scrutiny by the trial judge. Royal v. Missouri Highway & Transportation Comm'n., 655 F.2d 159, 164 (8th Cir. 1981).

682 at 726 (emphasis added).

7. Defendant may not base its employment decision on gender stereotypes or sexual bias. In Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702 (1978), the Supreme Court says, "It is now well recognized that employment decisions cannot be predicated on mere 'sterotyped' impressions about the characteristics of males or females. Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less." 435 U.S. at 707. Defendant's decision not to hire the more qualified applicant for Recreation

Director is based on such stereotyped impressions of the sexes as indicated in the questions asked the plaintiff during the interview and the testimony of the male committee members at trial. Other examples of discrimination by employers based on gender stereotypes which have been found to violate Title VII are found in Muntin v. California Parks and Rec. Dept., 671 F.2d 360 (9th Cir. 1982) (woman denied position as a deckhand); Williams v. Hoffmeister, 520 F. Supp. 521 (E.D. Tenn. 1981) (woman denied position as a school principal); EEOC v. Spokane Concrete Products, 534 F. Supp. 518 (E.D. Wash. 1982) (woman denied position as a truck driver); Woody v. City of West Miami, 477 F. Supp. 1073 (S.D. Fla. 1979) (woman denied position as a police officer).

8. As a matter of law, the court concludes that plaintiff has been discriminated against because of her sex in violation of Title VII, and is entitled to be made whole. Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975); White v. Carolina Paperboard Corp., 564 F.2d 1073 (4th Cir. 1977). Plaintiff is entitled to back pay based on the difference between her earnings and Kincaid's earnings in the Recreation Director position. See EEOC v. Korn Industries, Inc., 662 F.2d 256 (4th Cir. 1981). Consistent with the "make whole" purpose of Title VII, plaintiff is also entitled to interest on this amount at the rate of 8%, compounded semiannually, from the day the position of Recreation Director was filled in 1975 to the date of trial. Although plaintiff would normally also be entitled to receive the Recreation

Director position, plaintiff requested at trial that, given the passage of time, Kincaid not be "bumped" and the job given to her. Plaintiff is also entitled to receive interest on the amount awarded as required by 28 U.S.C. § 1961, as amended, from this date until the sum is paid.

9. Plaintiff, as prevailing party, is entitled to recover her costs and expenses, including reasonable attorneys' fees. A separate order is being entered herewith concerning fees, costs, and expenses.

10. Plaintiff is entitled to injunctive relief prohibiting future discrimination by the defendant on the basis of sex in its hiring practices.

A judgment will be entered based upon these findings of fact and conclusions of law.

This 16 day of February, 1983.

James B. McMillan
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-81-204-M

PHYLLIS A. ANDERSON,
Plaintiff,
-vs-
CITY OF BESSEMER CITY, NORTH CAROLINA,
Defendant.

) JUDGMENT

In accordance with the findings of fact and conclusions of law and order concerning fees entered herewith,

IT IS ORDERED, ADJUDGED AND DECREED:

1. That defendant is hereby enjoined from discriminating against the plaintiff and other females in hiring or in other terms and conditions of employment because of sex.

2. That the plaintiff have and recover from the defendant back pay in the sum of $30,397.00, with interest at the rate of 8%, compounded semiannually, from

the date defendant filled the position of Recreation Director in 1975 to the date of trial. Defendant is also directed to pay interest at the rate specified by 28 U.S.C. § 1961, as amended, from this date until paid.

3. That plaintif is allowed the costs of this action, including reasonable attorneys' fees and expenses, in the amount of $16,971.59, plus interest as required by 28 U.S.C. § 1961, as amended, from this date until paid.

This 16 day of February, 1983.

James B. McMillan
United States District Judge

Phyllis A. ANDERSON, Appellee,

v.

CITY OF BESSEMER CITY, NORTH CAROLINA, Appellant.

No. 83-1278.

United States Court of Appeals, Fourth Circuit.

Argued July 22, 1983.

Decided Sept. 19, 1983.

Philip M. Van Hoy, Hartford, Conn. (Siegel, O'Connor & Kainen, P.C., Hartford, Conn., Arthur C. Blue, III, Whitesides, Robinson & Blue, Gastonia, N.C., on brief), for defendant.

Jonathan Wallas, John T. Nockleby, Charlotte, N.C. (Chambers, Ferguson, Watt, Wallas, Adkins & Fuller, P.A., Charlotte, N.C., on brief), for appellee.

Before RUSSELL, WIDENER and HALL, Circuit Judges.

K.K. HALL, Circuit Judge:

Phyllis A. Anderson filed this suit pursuant to Title VII of the Civli RIghst Act of 1964, 42 U.S.C. §2000e et seq. Anderson alleged that defendant, City of Bessemer City, North Carolina (the City), discriminated against her on the basis of sex when it failed to hire her as its Recreation Director. Following a bench trial, the district court, 557 F.Supp. 412, entered judgment in favor of Anderson and ordered back pay and costs, including attorney's fees. From this judgment, the City appeals. We reverse.

I.

In the spring of 1975, the City began seeking applicants for the position of Recreation Director. A committee of five persons was appointed by the mayor to make the selection. The mayor appointed Leona Auddie Boone, the selection commit-

tee's only female member, to be its chairperson. The record reveals that no specific prehiring guidelines for the position had been established.[1]

---

1. A letter from Wiliam E. Metcalf, City Manager, sent to the succesful applicant, Donald Kincaid, after he was hired, describes the duties of the position of Recreation Director as follows:

> The duties of the recreation director of Bessemer City will endeavor [sic] to develop a well rounded recreation program for the use and benefit of the citizens of Bessember City. His duties are expected to encompass and include, but not limited [sic] to, the following:
>
> 1) To manage all recreation facilities in the City of Bessemer City.
>
> 2) To develop recreation programs to serve the needs of all age groups and both sexes.
>
> 3) Organize a program of competitive sports in a comprehensive program.
>
> 4) Manage the Bessemer City Community Centers.
>
> 5) Direct the operations of the swimming facilities.
>
> 6) Develop facilities and planning and proposed methods of financing the plans for improvement in addition to the city recreation facilities.

Eight persons applied for the job and submitted their resumes, including Anderson, who was the only female applicant. All eight applicants were interviewed by the selection committee on the same day. Following the interviews, the committee members determined that only three of the applicants were qualified for the job. They were Bert Broadway, Donald Kincaid, and Anderson.

For the two years immediately preceding his application, Broadway, who was a

---

1. (continued)

> 7) Perform other related duties as may be assign by the City Manager.
> 8) The Recreation Director is under direct supervision and control of the City Manager and is expected to work together with, and receive advise [sic] from the Bessemer City recreation committee.
> 9) The Recreation Director is hereby delegated the authority to hire and fire all employees in the recreation department.

licensed recreator, had been the Recreation Director for Cramerton, North Carolina, a town located in the same county as Bessemer City. Broadway was not a college graduate, although he had taken college-level classes, includng five electives in physical education. Because of his experience, Broadway was the first choice of all the committee members, including Boone, the only female member. During his interview, however, Broadway had indicated that he was unwilling to move to Bessemer City to accept the job. For that reason, the committee members eliminated him from further consideration and proceeded to decide between Kincaid and Anderson. Four members voted in favor of Kincaid because, as they testified at trial, they believed he had a superior educational background. Boone was the only member to vote for Anderson. Kincaid was hired for the position.

When he applied for the job, Kincaid was twenty-four years old. A year earlier he had received a Bachelor of Science degree in health and physical education. In connection with his college experience, Kincaid had listed on his resume the following "method and activity courses": basketball, football, baseball, volleyball, track soccer, swimming, tennis, skiing, badminton, and golf. He also indicated that he had participated in college intramural sports. Included as other interests on Kincaid's resume were coaching, reading, and music.

At trial, Kincaid testified that as part of this college training, he had taken courses in how to teach and evaluate sports and physical eduaction. He also testified that his course work included organizing and administering

physical education programs, with an emphasis on planning and developing facilities, budgeting, purchasing, maintenance, and insurance. Finally, Kincaid stated that he had taken courses in first-aid and public speaking. Kincaid had played various sports as a high school student in Bessemer City and had served as a little league sports coach before applying for the job with the City.

Kincaid had been a student teacher of physical education at a high school in Tennessee during 1973-1974 and in 1974 received his teacher's certification after passing a national examination. When he applied for the position of City Recreation Director, he was employed in the finance department of a credit company, where he had some experience in dealing with the public.

At the time of her interview, Anderson was thirty-nine years old. In 1973, she received a Bachelor of Arts degree in elementary education. She had also taken additional courses, including a Dale Carnegie course and a class in decoupage.

Around 1956-1957, Anderson had worked approximately one year at a North Carolina state mental hospital, where she had instructed patients in recreational activities, including sports, dancing, and signing. In connection with this position, Anderson had obtained a state certificate as a Recreation Director. Although her duties at the hospital may have included some supervision of employees, she had no authority to hire, fire, or discipline. Anderson's job experience also included being a receptionist in a doctor's office in 1959 and working as a part time department store clerk in the early 1960's.

Before applying for the job of Recreation Director, Anderson had been a substitute elementary school teacher for about ten years and had taught a third grade class in 1973-1974.

At trial Anderson testified that her duties as an elementary school teacher included being responsible for physical education and organizing and supervising children's games. She testified that she attended sports events in which her two sons participated and that she had played softball and basketball.[2] Anderson had also participated in various civic activities, which involved fund raising and public speaking. Her resume further indicated that she played the piano and had been a music director.

---

2. At oral argument, Anderson's counsel stated that her experience playing basketball occurred in the mid-1950's.

There was conflicting testimony at trial with respect to whether all of the candidates had been questioned about their amenability to travelling and working at night and about their spouses' reactions to these aspects of the job. Anderson claimed that one of the male selection committee members had posed a single question to her on these subjects, but she could not identify which committee member it had been. Boone, the committee's chairperson and only female member, testified that she did not recall other candidates being asked such questions. Boone admitted, however, that she had commented to Kincaid, "and your new bride won't mind." Another committee member testified that the inquiry about night work was asked of all applicants. According to the testimony of a third committee member, both Kincaid and Anderson had been

questioned about their willingness to work at night. Kincaid testified that, although he could not pinpoint the question, he recalled communicating to the committee his understanding that the job would require after hours work.

When the committee failed to hire her for the position, Anderson filed a charge of sex discrimination with the Equal Employment Opportunity Commission and, after receiving notice of her right to sue, brought this Title VII action. The City defended on the ground that Kincaid was hired because of his superior educational credentials. After hearing the evidence, the district court issued a Memorandum of Decision, concluding tht the City's reason for hiring Kincaid was pretextual and that Anderson had been denied the job because of her sex. The district court then directed plaintiff's

counsel to submit proposed findings of fact, conclusions of law, and an appropriate judgment. The City filed a motion, objecting to the delegation of this function to plaintiff and requesting the trial judge to write his own opinion. This motion was denied, but the City was invited to and did in fact respond to plaintiff's findings and conclusions after they were filed. The substance of plaintiff's submission was adopted by the trial court as the final opinion in the case.

In this opinion, the trial judge concluded that the male committee members were biased toward selecting a male, particularly one who was versed in traditionally male-dominated sports. Furthermore, in reaching his conclusion that Anderson had been discriminated against because of her sex, the trial judge specifically found that Anderson was "more

qualified than Kincaid to perform the broad range of duties required of a recreation director." He further found that Anderson was the only candidate who had been asked any "serious question about night work or reaction of spouses."

II.

On appeal, the City contends that these two critical findings of the trial court were clearly erroneous and require a reversal of the judgment in favor of Anderson. The City also challenges the trial court's conclusion that the City's refusal to hire Anderson was based on gender stereotypes and sexual bais. Finally, the City argues that the trial court unlawfully delegated to plaintiff's counsel the judicial function of writing the opinion in the case. We agree with each of these contentions.

As we recently stated in Lewis v. Central Piedmont Communtiy College, 689 F.2d 1207, 1209 (4th Cir. 1982):

> In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93S.Ct. 1817, 26 L.Ed.2d 668 (1973), the Supreme Court established the basic allocation of the burdens and order of presentation of proof in cases alleging discriminatory treatment. [Footnote omitted] First, the plaintiff has the burden of establishing a prima facie case of discrimination. Then the burden shifts to the employer to articulate a legitimate, non-discrimnatory reason for rejecting the plaintiff. The burden of proving discrimination, however, remains with the plaintiff, and, therefore, if the employer presents legitimate reasons for plaintiff's rejection, it is the plaintiff's burden to prove that those reasons were actually a pretext for discrimination.
>
> In order to establish a prima facie case, "[t]he plaintiff must prove by a preponderance of the evidence that she applied for the available position, for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

That Anderson met her initial burden of

establishing a prima facie case of discrimination is not seriously contested. Any inference of discriminatory intent, however, was dispelled by the City's clear explanation that Kincaid had better qualifications for the job. Our review, therefore, is focused on whether or not Anderson met her remaining burden of showing that the City's articulated nondiscriminiatory reason for selecting Kincaid was in fact pretextual, as the district court found. As stated previously, the district court's conclusion that Anderson had been the victim of intentional discrimination depended in large part on its findings that Anderson was both better qualified than Kincaid and also had been subjected to disparate selection treatment.

III.

Directing our attention first to the matter of qualifications, we note that it

is not enough for Anderson to show that she ws just as qualified as Kincaid to perform the jon. Her burden is to establish that she was better qualified than the successful applicant. EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633, 672 (4th Cir. 1983). The record in this case simply fails to support the district court's finding that between the two candidates, Anderson had the superior credentials.

Although the selection committee had not established prehiring guidelines for the Recreation Director's position, it is clear that athletics was a significant and legitimate concern of all the committee members, both male and female. This is obvious from the fact that Broadway was considered the most qualified of all the candidates by all selection committee members, including Boone. Broadway's resume, which was admitted into evidence,

emphasizes his background in athletics, equipment, and games, including football, baseball, and basketball. Thus, although the position also involved other aspects of recreation, the entire committee perceived knowledge of athletics and sports to be an important and integral part of the Recreation Directors responsibilitiy.

Moreover, there is simply nothing in the record to support Anderson's claim that the selection committee manipulated the requirements of the job to favor Kincaid over Anderson. Contrary to Anderson's assertion, the four male committee members were not inconsistent in ranking Kincaid as their second choice, because of his college degree, when their first choice, Broadway, was not a college graduate. Of the three applicants considered to be qualified for the job, Broadway,

who was already a recreation director in another city, clearly had the most current and directly relevant job-related experience, which the committee was seeking, despite the fact that he had no college degree. Similarly, it is clear that Kincaid, who was a recent college graduate, holding a degree in a specific academic discipline related to recreation, had the most directly relevant work experience. Anderson, on the other hand, had neither the current job-related experience of Broadway, nor the current job-related education of Kincaid. Anderson held merely a college degree in an unrelated field, elementary education, and had practical experience which, with one exception, was only indirectly related to recreation.[3]

---

3. The exception was the job Anderson had for one year at a state hospital around 1957, in connection with

Unlike Kincaid, Anderson's own participation in sports was primarily limited to her basketball experience some twenty years previously. This experience, even when considered in conjunction with her exposure to team sports as a mother of two sons and as an elementary school teacher, is simply not comparable to Kincaid's personal involvement and formal training in athletics. Neither candidate had specific experience in budgeting or in employee supervision. Anderson's budgetary experience was limited to collecting money for school lunches and trips and her supervisory experience, if any, at her state

---

3. (continued)

which she had obtained her license as a recreator. These events, however, occurred some eighteen years before Anderson applied for the position with the City and hardly overcome Kincaid's recent job-related training to make her <u>better</u> qualified for the position than Kincaid.

hospital job was too remote in time to merit serious consideration.

There is no question that Anderson was qualified for the job. Nevertheless, the evidence shows that Kincaid's overall training was superior to Anderson's training and experience for the demand of this job.[4] Even among equally qualified

---

4. When asked about particular, individual comparisons in qualifications between Anderson and Kincaid, even Boone specifically denied that Anderson was better qualified.

> Q Did you personally conclude that the plaintiff, Ms. Anderson, would be better qualified than Mr. Kincaid to institute a dance program?
>
> A No. I think Mr. Kincaid would be fine.
>
> Q You do not believe in that sense Ms. Anderson's qualifications were superior?
>
> A No, indeed.
>
> Q How about art, do you believe either one of them had qualifications superior to the other .... As to the subject of art specifically?
>
> A No.

candidates, an employer has discretion to choose the person he prefers. "The fact that a court may think that the employer misjduged the qualifications of the applicants does not in itself expose him to Title VII liability...." Burdine, 405 U.S. at 259, 101 S.Ct. at 1097. In finding Anderson better qualified than Kincaid, the district court impermissibly substituted its own judgment for that of the selection committee. Because, after reviewing the entire evidence, we are "left

---

4. (continued)

> Q As to the subject of dramatics?
>
> A No, a rounded program, sir.
>
> Q As to the subject of public speaking, specifically?
>
> A No, sir.
>
> Q As to the subject of team sports, specifically?
>
> A No.

with the definite and firm conviction that a mistake has been committed," United States v. United States Gypsum Co., 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746 (1948), the district court's finding that Anderson was better qualified than Kincaid is clearly erroneous. Fed.R.Civ.P.52(a).

IV.

We next consider the district court's finding that Anderson was the only applicant seriously questioned about night work, travel, and her family's reaction to these job requirements. This finding was based in substantial part on Boone's testimony, including the following excerpt from the City's cross-examination of Boone:

> Q You testified about the famous question about the family's reaction to the job. Who on the committee asked Ms. Anderson that question?
>
> A I don't recall.

Q So, like Ms. Anderson, you know it was asked, but you don't remember who asked it?

A It was either Tim Helms -- Tim, I'm not going to put you on the spot. Let me say I don't recall. I'm not going to say because it would be just like picking a name out of a hat.

Q Do you deny that the other applicants, aside from the plaintiff, were asked about the prospect of working at night in that position?

A Not to my knowledge.

Q Are you saying that they were not asked that?

A They were not asked, not in the context that they were asked of Phyllis. I don't know whether they were worried because Jim wasn't going to get his supper or what. You know, that goes both ways.

Q Did you tell Phyllis Anderson that Donnie Kincaid was not asked about night work?

A He wasn't asked about night work.

Q That answers one question. Now, let's answer the other one. Did you tell Phyllis Anderson that, that Donnie Kincaid was not asked about night work?

A Yes, after the interview -- I think the next day or sometime, and I know -- may I answer something?

Q If it's a question that has been asked; otherwise, no. It's up to the Judge to say.

A You asked if there was any question about -- I think Donnie was just married, and I think I made the comment to him personally -- and your new bride won't mind.

Q So, you asked him yourself about his own wife's reaction?

A No, no.

Q That is what you just said.

The evidence in this case, even including Boone's testimony, amply demonstrate that a substantially similar question concerning after-hours work and family reaction was posed both to Anderson and Kincaid, if not to all candidates. Nor are we convinced by the district court's characterization of Boone's remark to Kincaid, "and your new bride won't mind," as facetious and asked merely out

of annoyance or frustration. The record does not indicate the sequence of the interviews and thus fails to provide the requisite support for this theory, which presumes that the six unsuccessful male candidates were interviewed first, followed by Anderson, and then Kincaid. Moreover, the record clearly demonstrates that night work and travel were anticipated functions of the position. Thus, any question on these subjects to any of the candiates were certainly job-related.

The district court's finding that Anderson was the only candidate seriously questioned about these matters represents another instance in which the trial court impermissibly interjected its own judgment into the case. The finding is without evidence to support it and is, therefore, clearly erroneous. Fed.R. Civ.P.52(a).

V.

Next, we address the district court's conclusion that the male committee members were biased in favor of hiring a male and that the City's "decision not to hire the more qualified applicant [i.e. Anderson] for Recreation Director is based on such stereotyped impressions of the sexes as indicated by the questions asked the plaintiff during the interview and the testimony of the male committee members at trial." We have already determined that the district court's findings with respect to Anderson's qualifications and her treatment in the selection process were clearly erroneous. Without these critical findings, the remaining evidence relied on by the district court is simply insufficient to support the district court's conclusion that the male committee members

were biased.[5]

The district court placed special emphasis on the fact that the City's hiring decision was made on the basis of subjective, unarticulated criteria. The use of subjective criteria to hire employees is not, however, illegal per se. As the Supreme Court pointed out in McDonnell Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), "the mere

---

5. The district court concluded that bias was inferred from the failure of one of male committee members to solicit applications from two female school teachers he knew and from remarks made by another committee member that it would be "real hard," in his opinion, for a woman to serve as Recreation Director. This evidence, however, is inadequate to support a finding of bias, and is dispelled by other portions of the record. For example, there is nothing to show the male committee members had a bias against working women. All four testified that their wives had worked and were accustomed to being away from home during evening hours. The wife of one committee member had worked a night shift for ten years and the wife of another had performed night works as a Registered Nurse.

fact that subjective criteria are involved in the reason articulated by an employer does not prevent according it sufficient rebuttal weight to dispel the prima facie case." Page v. Colger, 645 F.2d 227, 230 (4th Cir. 1981). We have previously discussed the legitimate importance which all the committee members attributed to athletics and team sports in the Recreation Director's role (see Part III of this opinion). Suffice it to say that our review of the entire record leads us to conclude that Anderson failed to carry her burden of demonstrating sex-based bias on the part of the male committee members. Likewise, given this record, she failed to fulfill her overall burden of proving intentional discrimination because of her sex. Thus, the district court's judgment in her favor must be reversed.

VI.

Our close scrutiny of the record in this case is justified by the manner in which the opinion was prepared. In this regard, we remind the district court of our recent admonitions, condemning the practice of adopting the prevailing party's proposed findings of fact and conclusions of law. See, e.g., Cuthbertson v. Biggers Bros., Inc., 702 F.2d 454, 458-59, 465-66 (4th Cir. 1983); EEOC v. Fedreal Reserve Bank of Richmond, 698 F.2d 633, 640-41 (4th Cir. 1983); Holsey v. Armour & Co., 683 F.2d 864 (4th Cir.1982).

In Chicopee Manufacturing Corp. v. Kendall Company, 288 F.2d 719 (4th Cir. 1961), we recognized that:

> [t]here is authority for the submission to the court of proposed findings of fact and conclusions of law by the attorneys for the opposing parties in a case, and the adoption of the proposed findings and conclusions as the judge may find to be proper...

> But there is no authority in the federal courts that countenances the preparation of the opinion by the attorney for either side. That practice involves the failure of the trial judge to perform his judicial function....

Id. at 724-25. In Chicopee, we specifically held that such a practice justified reversal of the judgment and a remand for further proceedings. See also, Cuthbertson, 702 F.2d at 465.

Anderson contends that the procedure employed in this case was appropriate because defendant's counsel had an opportunity to respond to plaintiff's proposed findings and conclusions, and because the trial judge made some changes in plaintiff's submission. We disagree. Although in this case the district court did not adopt verbatim Anderson's proposed findings and conclusion, it did adopt the substance of her submission, with certain rewording and additions. Furthermore,

the trial judge had already issued his Memorandum of Decision in favor of plaintiff when he directed plaintiff's counsel to submit proposed findings and then permitted defendant's counsel to respond. This procedure is substantially different from requesting attorneys on opposite sides to submit proposed findings and conclusions before a judgment is rendered. We, therefore, conclude that the method employed by the trial judge in preparing his opinion in this case continues to violate the intent of our earlier decisions, including Chicopee, and cannot be sanctioned.

VII.

For the foregoing reasons, the judgment entered by the district court in favor of Anderson is hereby reversed.

REVERSED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 83-1278

FILED
NOV. 4 1983
U.S. Court of Appeals
Fourth Circuit

Phyllis A. Anderson,

Appellee,

versus

City of Bessemer City,
North Carolina

Appellant.

ORDER

Upon consideration of the appellee's petition for rehearing and suggestion for rehearing en banc and appellee's motion to exceed the page limitation in petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

IT IS ORDERED that the motion to exceed the page limitation in petition for rehearing and suggestion for rehearing en banc is GRANTED.

IT IS FURTHER ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Hall for a panel consisting of Judge Russell, Judge Widener and Judge Hall.

For the Court,

/s/William K.Slate, II
CLERK

JAN 4 1984

RESPONDENT'S

BRIEF

(2)

No. 83-1623

Office - Supreme Court, U.S.
FILED
MAY 3 1984
ALEXANDER L. STEVAS
CLERK

In The
Supreme Court of the United States
October Term, 1983

PHYLLIS A. ANDERSON,

Petitioner,

vs.

CITY OF BESSEMER CITY,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PHILIP M. VAN HOY*
MULLINS & VAN HOY
1001 East Blvd.
Charlotte, NC 28203
(704) 377-6022

ARTHUR C. BLUE, III
WHITESIDES, ROBINSON & BLUE
246 West Main Avenue
Gastonia, NC 28053
(704) 864-5728

Attorneys for Respondent

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

68 pp

TABLE OF CONTENTS

	Pages
Statement of the Case	1
Response to Petition For Certiorari	6
Summary of Response	6
I. The Fourth Circuit's Determinations of "Clear Error" in This Action and Other Employment Discrimination Actions Were Not Based on Reversals of the District Court's "Credibility Determinations"	7
II. The "Working Wife Defense" Was Not Dispositive of The Fourth Circuit Opinion Below	15
III. The Authority of the Circuit Courts to Review Credibility Determinations of District Courts Is Not at Issue in This Action	17
Conclusion	19
Appendix:	
Defendant's Motion for Relief From Order	1a
District Court's Order Denying Defendant's Motion for Relief from Order	3a
Proposed Findings of Fact and Conclusions of Law	4a
Defendant's Response to Plaintiff's Findings of Facts and Conclusions of Law	29a
Appellant's Appeal of District Court's Judgment	42a

TABLE OF AUTHORITIES

Pages

CASES:

Bethea v. Charlotte Transit System No. 82-1526 (4th Cir., March 22, 1984) ____ 14

Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978) ____ 12

Brady v. Thurston Motor Lines, — F. 2d —, 33 FEP Cases 1370 (4th Cir., 1984) ____ 11, 13, 18

Cuthbertson v. Biggers Bros., 702 F. 2d 454 (4th Cir., 1983), *cert. pending* ____ 11, 12, 13

EEOC v. Federal Reserve Bank, 698 F. 2d 633 (4th Cir. 1983), *cert. gnt.* — U.S. — (1983) ____ 11, 12, 13

Furnco Construction Co. v. Waters, 438 U.S. 567 (1978) ____ 12, 16

Holsey v. Armour and Co., 683 F. 2d 864 (4th Cir. 1982) ____ 12, 13

Lewis v. Central Piedmont Community College, 689 F. 2d 1207 (4th Cir., 1982), *cert. den.* — U.S. — ____ 11, 18

Lilly v. Harris-Teeter Supermarket, 720 F. 2d 326 (4th Cir., 1983), *cert. den.* April 23, 1984 ____ 11, 13

Lovelace v. Sherwin-Williams Co., 681 F. 2d 230 (4th Cir., 1982) ____ 14

McDonnell Douglas Co. v. Green, 411 U.S. 792 (1973) ____ 12, 16

Miller v. Mercy Hospital, 720 F. 2d 356 (4th Cir. 1983), *cert. pending*, No. 83—— ____ 11, 17, 19

Pullman-Standard v. Swint, 456 U.S. 273 (1982) ____ 11, 12, 14

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) ____ 12, 16

TABLE OF AUTHORITIES—Continued

Pages

STATUTES:

42 U.S.C. §§2000e et seq. ____ 1

RULE:

Rule 52, Federal Rules of Civil Procedure ____ 7, 10, 17, 19

No. 83-1623

In The
Supreme Court of the United States
October Term, 1983

PHYLLIS A. ANDERSON,
Petitioner,

vs.

CITY OF BESSEMER CITY,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STATEMENT OF THE CASE

On May 18, 1981, petitioner, Phyllis Anderson, commenced this action in the United States District Court for the Western District of North Carolina. Her complaint alleged that the defendant, City of Bessemer City, North Carolina, ("the City") had failed to hire her because of her sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, ("Title VII") when the City in 1975 selected male Donald Kincaid for the job position of City Recreation Director.

The case was tried without a jury during September, 1982, before United States District Judge James B. McMillan. Certain facts developed on the record were not disputed. In the Spring of 1975, the Mayor of the City appointed a five-person committee to select a Recreation Director for the City. The Mayor selected female Leona "Auddie" Boone to be chairperson of the selection committee. Boone, who was petitioner's only trial witness from the selection committee, personally solicited petitioner to apply for the position.

In due course, eight persons applied to the selection committee to be considered for the Recreation Director job. Of the eight applicants petitioner was the only female. All eight applicants were interviewed by the committee on the same evening, and several applicants submitted written resumes and employment histories. There was no evidence presented at trial concerning the order in which the interviews were conducted.

After the completion of the interviews, the selection committee unanimously concluded that three applicants, Bert Broadway, Donald Kincaid, and the petitioner, were qualified for the job. The committee initially preferred Broadway, because of his work-related experience as the then-incumbent Recreation Director for the nearby municipality of Cramerton. Broadway was not selected, however, because of the committee's unanimous opinion that the selectee should be willing to reside in the City, which Broadway had indicated he was not willing to do. The committee then voted four to one to offer the job to Kincaid, who thereafter accepted the position, which he still occupies. The dissenting vote was cast by Auddie Boone.

At trial, each of the four committee members who voted for the successful applicant, Kincaid, testified that

they considered him to be the better candidate than petitioner because he had received a bachelor of science degree in recreation and physical education one year before applying for the position. Some committee members also emphasized Kincaid's involvement in the City's recreation programs, including athletic competitions, coaching, umpiring, and other volunteer activities. A detailed reiteration of Kincaid's job-related credentials is contained in the Fourth Circuit's opinion in this case. 717 F. 2d 149, 151.

Petitioner's job experience related to recreation, by contrast to Kincaid, was limited to duties for a year or less duration involving recreation at a state mental hospital in North Carolina, which duties were not in Bessemer City. When queried about these duties at trial, plaintiff had no recollection of her job title, if any, and admitted that these duties had concluded no later than 1957, some eighteen years prior to her application for the Recreation Director position which is at issue in the present action. 717 F. 2d 151, 153-4.

At trial, petitioner contended that she was subjected by the City's selection committee to disparate selection criteria, specifically, inquiries about willingness to work at night and about her family's reaction to her applying for the position. She claimed that one of the male selection committee members had asked a single question on these subjects, but she could not identify which committee member it had been. Petitioner's witness Auddie Boone, her only witness from the selection committee, herself admitted that she personally asked substantially the same questions of Kincaid, the successful applicant. Another

committee member testified that the inquiry about night work was asked of all applicants. A third committee member testified that at least petitioner and Kincaid were queried on these subjects. Kincaid himself testified that he understood that the job would require work at night. 717 F. 2d 149, 154-55.

In addition to thus claiming superior job qualifications and disparate selection criteria, petitioner at trial also asserted that the City had manipulated its stated selection criteria to exclude her, by emphasizing job-related experience relative to Bert Broadway, and alternately, educational qualifications relative to Donald Kincaid.

District Judge McMillan decided each of the contended issues in favor of petitioner, in a three-page "Memorandum of Decision" issued September 16, 1982, in which he issued his ruling finding unlawful discrimination and directing only petitioner's counsel to draft a "somewhat enlarged version" of the decision. Petitioner's Appendix. pp. 1a-5a.

The City then moved Judge McMillan to write his own opinion, in conformity with 4th Circuit authority disapproving of the practice of opinion-writing by counsel for one side in litigation. Respondent's Appendix, pp. 1a-2a. Judge McMillan denied the City's motion (Respondent's Appendix, p. 3a), and petitioner's counsel proceeded to expand the decision to a 28-page proposed opinion. Respondent's Appendix, pp. 4a-28a. The City commented extensively on petitioner's opinion (Respondent's Appendix, pp. 28a-41a), which nonetheless was adopted in substance by Judge McMillan as the opinion of the district court. 557 F. Supp. 412 (W.D.N.C., 1983).

The City then appealed to the Fourth Circuit on three distinct grounds:

a. That the district court's conclusion that the City's rebuttal to petitioner's *prima facie* case, i.e., that petitioner was not more qualified than the successful applicant was "pretextual", was not supported by the record;

b. That the district court's conclusion that plaintiff was subjected to disparate selection criteria was clearly erroneous; and

c. That the district court's delegation of the opinion-writing to counsel for one adversary party constituted independent grounds for reversal, and required close scrutiny of the district court's reported decision. 717 F. 2d 149, 152.

On appeal, the Fourth Circuit reversed the district on the grounds that there was no support in the record for the district court's conclusions that plaintiff had been subjected to disparate selection criteria, and that the City's rebuttal evidence concerning the reasons for petitioner's rejection had no basis in the record for being determined by the district court to be "pretextual". The district court's delegation of the opinion-writing to counsel for petitioner was also disapproved by the Circuit. 717 F. 2d 149 *et seq.*

Petitioner then moved the Fourth Circuit for rehearing or rehearing *en banc*, which motion was denied unanimously on November 4, 1983. Petitioner's Appendix, pp. 66a-67a. Petitioner then petitioned the Fourth Circuit for a writ of *certiorari*, which petition, with supporting

arguments and appendix, was served on respondent's counsel of record, Philip M. Van Hoy, on April 4, 1984.

Petitioner here raises three issues:

I. Whether *certiorari* should be granted to review the Fourth Circuit's purported practice in Title VII cases of finding "clear error" in district court determinations of employment discrimination;

II. Whether *certiorari* should be granted to review the "working wife defense" allegedly relied on by the Fourth Circuit; and

III. Whether *certiorari* should be granted to resolve an alleged conflict in the Circuits concerning the authority of the Circuits to review credibility determinations by the district courts.

RESPONSE TO PETITION FOR CERTIORARI

Summary of Response

I. The Fourth Circuit's determinations of "clear error" in this and other employment discrimination actions were not based on reversals of the district court's "credibility determinations".

II. The "working wife defense" was not dispositive of the Fourth Circuit's opinion in this action.

III. The Fourth Circuit's reversal of the district court was based on the absence of record evidence of unlawful discrimination, not reversals of credibility determinations by the district court.

I.

The Fourth Circuit's Determinations of "Clear Error" in This Action and Other Employment Discrimination Actions Were Not Based on Reversals of the District Court's "Credibility Determinations"

The petitioner attempts through her petition for *certiorari* to implicate the limited scope of review of district court *credibility* determinations permitted the Circuit Courts by Rule 52 of the Federal Rules of Civil Procedure. Specifically, the petition asserts that the present action is one of a continuing line of Fourth Circuit opinions, in Title VII cases, where the Circuit allegedly has upset district court credibility findings.

Reference to the Fourth Circuit opinions cited as alleged authority for petitioner's contention, including and most specifically, the Fourth Circuit's opinion in this action, demonstrates that the appellate review limitations of Rule 52 actually are not implicated in these decisions. Instead, this and the other cited actions were reversed by the Fourth Circuit because the district court decisions were *not supported by the trial record,* not because witnesses believed by the district court were not believed by the Circuit panels.

The portion of Rule 52 pertinent to the present controversy holds: *"Findings of fact* shall not be set aside unless *clearly erroneous,* and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." (emphasis supplied).

Reference to Rule 52 itself, and to the Fourth Circuit's application of the Rule, demonstrates in the present

case and in the cases cited by petitioner (Petition for *certiorari*, pp. 14-16) that "credibility determinations" were not involved in the reversals of the single district court from which *each* of the cited Fourth Circuit opinions arose. Instead, for the reasons expressed hereinbelow, the Fourth Circuit reversals were based on determinations, from review of the records of the various cases cited by petitioner, that:

1. The reversals of the district court were in large measure of conclusions of law, rather than of subsidiary factual findings; and

2. The reversals of such conclusions of law were due to the absence of matters of record to support the conclusions, not that the district court's factual findings were supported by the record but were nonetheless reversed by the Fourth Circuit.

In the instant case, the district court based its finding of unlawful sex discrimination on several subsidiary findings. As to *each* of these findings, the Fourth Circuit specifically noted in its opinion reversing that there was *no evidence of record* to support the district court's conclusion of law that discrimination had occurred; what the district court *believed* about the trial testimony simply was not the issue:

1. The district court first concluded that plaintiff was better qualified for the Recreation Director position than the successful male applicant, Donald Kincaid. After reviewing the evidence that Kincaid had superior educational qualifications and experience, vis a vis the plaintiff, the Fourth Circuit specifically noted that "The *record* in this case simply fails to support the district court's finding that between the two candidates, Anderson had the superior credentials." 717 F. 2d 149, 153. (emphasis supplied).

2. Next, as to the district court's conclusion that the City manipulated the expressed qualifications for the job, the Fourth Circuit specifically held that ". . . there is simply *nothing in the record* to support Anderson's claim that the selection committee manipulated the requirements of the job to favor Kincaid over Anderson." 717 F. 2d at 153, that ". . . the *evidence shows* that Kincaid's overall training was superior to Anderson's training and experience for the demands of the job." 717 F. 2d at 154, that Anderson's own witness from the selection committee "specifically denied that Anderson was better qualified." 717 F. 2d at 154, f.n. 4., and, in summary, that "Because, after reviewing the *entire evidence* we are 'left with the definite and firm conviction that a mistake has been committed' (citation omitted), the district court's finding that Anderson was better qualified than Kincaid is clearly erroneous". 717 F. 2d at 154 (emphasis supplied).

3. Third, as to the district court's determination that Anderson, the petitioner, was the only candidate queried about the selection criterion of willingness of the candidates and their families for the job candidates to work at night, the Fourth Circuit again held, not that the district court had credited incorrectly one witness' testimony in this regard over another, but that there was *no* evidence to support such a finding:

"The evidence in this case, even including (petitioner's witness) Boone's testimony, amply demonstrates that a substantially similar question concerning after-hours

work and family reactions was posed to both Anderson and Kincaid (the successful applicant) . . . The *record* does not indicate the sequence of the interviews and thus fails to provide the requisite support (for petitioner's theory) . . . Moreover, the *record* clearly demonstrates that night work and travel were . . . certainly job-related. . . . The finding is *without evidence to support it*, and is, therefore, clearly erroneous. Fed. R. Civ. P. 52(a)." 717 F. 2d at 155 (emphasis supplied).

4. The Fourth Circuit's final reversal of the district court's findings subsidiary to the conclusion of unlawful discrimination related to the district court's conclusion of law, not Rule 52 finding of fact, that the four male selection committee members were biased in favor of hiring a male and was based on "stereotyped impressions" of females. Again, the Fourth Circuit opinion specifically notes, not that the district court's opinion improperly credited certain testimony and rejected other testimony, but that there was *no evidence in the record* to support this conclusion:

"We have already determined that the district court's findings with respect to Anderson's qualifications and her treatment in the selection process were clearly erroneous. Without these critical findings, the remaining evidence relied on by the district court is *simply insufficient to support the district court's conclusion* that the male committee members were biased. . . . Our review of the *entire record* leads us to conclude that Anderson failed to carry her burden of demonstrating sex-based bias on the part of the male committee members. Likewise, given this *record*, she failed to fulfill *her overall burden of proving*

intentional discrimination because of sex." 717 F. 2d at 155, 156 (emphasis supplied).

At pp. 14 and 15 of the petition for *certiorari*, the petitioner asserts: "Since April 27, 1982, the date on which *Pullman-Standard v. Swint*, 456 U.S. 273 (1982) was decided, the Fourth Circuit has found clear error in every Title VII case in which a district court had found intentional employment discrimination on the basis of race or sex." In purported support of this assertion, petitioner cites *EEOC v. Federal Reserve Bank*, 698 F. 2d 633 (4th Cir., 1983), *cert. gnt.* — U.S. — (1983); *Miller v. Mercy Hospital*, 720 F. 2d 356 (4th Cir., 1983), *cert. pending*, No. 83——; *Lewis v. Central Piedmont Community College*, 689 F. 2d 1207 (4th Cir., 1982), *cert. den.* — U.S. —; *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326 (4th Cir., 1983), *cert. den.* April 23, 1984; *Brady v. Thurston Motor Lines*, — F. 2d —, 33 FEP Cases 1370 (4th Cir., 1984); and *Cuthbertson v. Biggers Bros.*, 702 F. 2d 454 (4th Cir., 1983), *cert. pending*.

What is *not* mentioned in petitioner's reference to these Fourth Circuit opinions, and yet what is critically important, is that *each* of these cases, and the instant case, were appealed from the *same* district judge, James B. McMillan. This is certainly no matter of mere coincidence but is instead a consistent and justified criticism of this particular judge by the Fourth Circuit for his continued practice of holding for employment discrimination plaintiffs *without record evidence* to support conclusions of unlawful employment discrimination. Presumably, had there been district court decsions in Title VII cases from other judges, reversed by the Fourth Circuit since *Swint*, petitioner would have found and cited them, to buttress

her claim of bias among the Fourth Circuit's judges. No decisions from other judges are cited for this proposition, because none is available to be cited.

Accordingly, the problem allegedly endemic in the Fourth Circuit of reversing district court determinations of unlawful employment bias as to race and sex is not a problem attributable to the Fourth Circuit, but is instead a *sui generis* flaw in this particular district judge's repeated insistence on placing the burden of proving the absence of discrimination on employers, in violation of the Supreme Court case law standards on allocation and burden of proof in Title VII cases. *McDonnell Douglas Co. v. Green*, 411 U.S. 792 (1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978); *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978).

Moreover, the Fourth Circuit's opinion in the present action specifically notes that "close scrutiny" of the district court's decision was necessary, in order to determine whether the opinion was "clearly erroneous" vis a vis *Pullman-Standard v. Swint, supra*, because the substance of the district court's findings and conclusions was prepared by counsel for Anderson rather than by the district judge himself. By the time the present case was appealed to the Fourth Circuit, this particular district judge repeatedly had been admonished not to let the prevailing counsel write his opinion for him. *Cuthbertson v. Biggers Brothers, supra; EEOC v. Federal Reserve Bank of Richmond, supra; Holsey v. Armour and Co.*, 683 F. 2d 864 (4th Cir., 1982); 717 F. 2d at 156.

This district court's continued intransigence in this respect fosters opinions which are not reflective of matters

on the record, for understandable and perhaps inevitable reasons, in that the district court's opinion is transformed into the work product of an advocate and adversary party, as the Fourth Circuit noted in *Holsey* and *Federal Reserve, supra*. This being the case, there is little wonder that the work product of counsel, which the district court adopted in the present case and these other cases, made findings and conclusions which could not be supported by the record.

The Fourth Circuit's condemnation of opinion writing by an adversary party, as discussed hereinabove, has been challenged recently in this Court, through *certiorari* petitions in *Cuthbertson* and *Federal Reserve, supra*. This Court has denied *certiorari* on this issue in both cases, which constitutes implicit approval of the Fourth Circuit's practice of subjecting Judge McMillan's ultimate fact findings and conclusions of law to "close scrutiny" of the record in such cases, in order to determine whether clear error is present.

Furthermore, and without burdening this Court with redundancies, respondent points out that in all of the cited cases "clear error" was determined because the *record* evidence simply would not sustain plaintiffs' burden of proof to demonstrate unlawful discrimination, since, in accordance with Supreme Court authority, defendants do not bear the burden of proving the absence of discrimination.

The title of petitioner's first argument refers to "the Fourth Circuit practice in Title VII cases of finding 'clear error' in all lower court findings of employment discrimination." Reference to the reported decisions in *Harris-Teeter* and *Brady v. Thurston Motor Lines, supra*, cited as

alleged authority for this proposition, demonstrates that the bulk of the district court determinations in favor of the plaintiffs were undisturbed on appeal. Petitioner's reliance on *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230 (4th Cir. 1982) similarly is misplaced, in that (1) *Lovelace* was not a Title VII case, and (2) despite petitioner's clear implication that the case was reversed on appeal, in fact the Fourth Circuit affirmed district Judge Woodrow Jones' granting of judgment *non obstante veridicto.* Moreover, petitioner's assertion that "There is no reported Fourth Circuit opinion since *Swint* finding clear error in a trial court employment discrimination decision favorable to a defendant" also is incorrect, even as to Judge McMillan, whose opinion dismissing the plaintiff's Title VII claim in *Bethea v. Charlotte Transit System,* No. 82-1526 (4th Cir., March 22, 1984; respondent's appendix pp. 42a-44a) was recently reversed by the Fourth Circuit, due to his failure to apply or even consider controlling Supreme Court case law authority.

In summary, petitioner in this proceeding complains about the Fourth Circuit's upsetting of the district court's holdings that plaintiff was submitted to disparate selection criteria, that the City had manipulated its selection criteria, that petitioner was better qualified than the successful applicant, and that the male selection committee members' employment decision was tainted with bias. These ultimate findings and conclusions of the district court can stand only if supported by record evidence, due to plaintiff's proof burdens in Title VII cases. In light of the *record* in this action, and the Fourth Circuit's review of the *record* in its underlying opinion herein, there is no room for cavil that Rule 52 implications about credibility

determinations simply did not come into play in the present case, or in the other Fourth Circuit opinions cited by the petitioner.

II.

The "Working Wife Defense" Was Not Dispositive of The Fourth Circuit Opinion Below

At trial, petitioner asserted that the male selection committee members were disinclined to hire a female because of bias attributable to their stereotypical views against women working in jobs requiring night duties. Petitioner now contends that the Fourth Circuit's recognition of the males' own wives' working at night, as rebuttal evidence, constitutes the Fourth Circuit's view that such rebuttal is a *complete* defense to sex discrimination allegations. For example, petitioner asserts:

"In the view of the court of appeals, marriage to working women effectively immunized the male committee members from any charge of employment discrimination on the basis of sex."

Petitioner's petition, p. 33.

"The 'working wife defense' would virtually nullify Title VII's prohibition against employment discrimination on the basis of sex."

Petitioner's petition, p. 35.

Petitioner also describes such rebuttal evidence as a "virtually conclusive defense in the Fourth Circuit to proof of employment discrimination on the basis of sex."

Petitioner's petition, p. 38.

In fact, however, reference to the fourth Circuit's opinion demonstrates uncontrovertably that the "working wife"

testimony was not proffered by respondent, nor treated by the Circuit, as a complete defense, but was instead only one of many instances of cumulative rebuttal evidence which, when viewed in light of the *entire record,* dispelled the inference of discrimination created by the petitioner's establishment of the *prima facie* case. *McDonnell Douglas, Burdine, Furnco, supra.*

Reference to the pertinent portions of the Fourth Circuit opinion reveals that the "working wife" issue was a portion, but in no sense the dispositive portion, of respondent's rebuttal to the *prima facie* case:

"The district court concluded that bias was inferred from the failure of one of the male committee members to solicit applications from two females. . . . This evidence, however, is *inadequate to support a finding of bias,* and is *dispelled by other portions* of record. *For example,* there is *nothing* to show the male committee members had a bias against working women. All four testified that their wives had worked and were accustomed to being away from home during evening hours." 717 F.2d 149, 155, f.n. 5. (Emphasis supplied.)

Thus, when read in light of the *entire* Fourth Circuit opinion below, and the proof, recognized in the Fourth Circuit's opinion, (1) that petitioner did not prove qualifications superior to the successful applicant, (2) that petitioner was not subjected to disparate selection criteria, and (3) that the district court's opinion required close scrutiny on review, because of its genesis by an adversary party, it is clear that the "working wife" issue was part and parcel of the entire rebuttal overlay, and was not a defense in and of itself, nonetheless a complete defense, as asserted by petitioner.

III.

The Authority of the Circuit Courts to Review Credibility Determinations of District Courts Is Not at Issue in This Action

In the last three pages of argument in her petition for *certiorari,* the petitioner attempts to raise the issue of the Circuit Court's limited authority, under Rule 52, to review credibility determinations of the district courts. Her arguments in this respect are incorporated by reference from the petitioner's arguments in the pending petition for *certiorari* in *Miller v. Mercy Hospital,* No. 83——. Respondent's counsel has no authority to defend, or responsibility for defending, the Fourth Circuit's reversal of District Judge McMillan in *Miller,* and accordingly does not comment on whether genuine credibility issues were reviewed or reversed by the Fourth Circuit in *Miller.* As to the present action, however, the Rule 52 spectre is simply a red herring because, as previously set out in Argument I hereinabove, the Fourth Circuit's reversal of the district court in the present action did not implicate credibility findings, and *ipso facto* did not implicate Rule 52.

Petitioner asserts that "the district judge expressly relied on the credibility of the witnesses in resolving the conflicting testimony of City officials regarding whether petitioner was asked personal questions not asked of the male applicants." Petitioner's petition, pp. 38-39. The cited authority for this assertion is the district court's findings and conclusions, which effectively were drafted by petitioner's counsel, at pp. 12a-13a of petitioner's appendix. At that portion of the petitioner's counsels' opinion for the district court, the opinion attempted to belittle

the record evidence that all candidates were asked substantially the same questions, and that the plaintiff's own witness, Auddie Boone, had herself so queried the successful candidate, Donald Kincaid. This was done by mischaracterizing the actual record testimony by, for example, characterizing Boone's questions as "facetious". The district court's "Memorandum of Decision", which preceded the petitioner's counsels' preparation of the district court's final opinion, contained no such characterizations, but instead simply declared that such questions were asked *only* of petitioner. (Petitioner's Appendix p. 4a.) Only after respondent's counsel commented on petitioner's draft opinion (as it was required to do to exhaust its remedies below, *Brady v. Thurston Motor Lines,* 33 FEP Cases 1370, 4th Cir., 1983), by noting through chapter and verse that all candidates were asked substantially the same questions, including Boone's queries of Kincaid (respondent's appendix, pp. 29a-41a), did the district court attempt to "appeal proof" its final opinion, out of whole cloth, by noting respondent's comments on the opinion but nonetheless distinguishing them as "credibility determinations". Recognizing Boone's own queries of Kincaid, but then changing them from the purportedly non-existent to the "facetious", is a signal case in point. This sort of abdication of the trial judge's responsibility which results from opinion-writing by an adversary party is precisely the reason why the Fourth Circuit has repeatedly condemned Judge McMillan's practice in this regard, a condemnation which has been denied review twice by this Court. *Lewis v. Central Piedmont Community College, EEOC v. Federal Reserve Bank, supra.*

Characterizing as "credibility determinations" this concerted effort by the district court and petitioner's counsel to "appeal proof" the district court decision, with the unwilling and necessary assistance of respondent's counsel (through their comments on petitioner's "draft opinion"), is simply to miss the point. The point is, instead, that denominating matters as "credibility issues", when there is *no evidence of record* to support such findings and conclusions, does not and cannot insulate such a practice from appellate review. Petitioner's counsel themselves crystallize the quandary rather well, in their *Miller v. Mercy Hospital certiorari* petition, at p. 25: "... the appellate courts could not meet their responsibility to reverse clear error, and to assure compliance with the law, if the mere presence of a single credibility issue totally immunized a trial court decision from review." Add to this statement that the supposed "credibility issue" in the *instant* case (1) has no support in the trial record, and (2) is created out of nothing, to try to insulate the district court decision from appellate scrutiny, and it becomes patent that the purported Rule 52 controversy in this action simply does not exist as a justiciable issue.

CONCLUSION

For the reasons and upon the authority herein stated, respondent submits that the petition for writ of *certiorari* to the United States Court of Appeals for the Fourth Circuit should be denied.

Respectfully submitted,

/s/ Philip M. Van Hoy
PHILIP M. VAN HOY*
MULLINS & VAN HOY
1001 East Blvd.
Charlotte, NC 28203
(704) 377-6022

/s/ Arthur C. Blue, III
ARTHUR C. BLUE, III
WHITESIDES, ROBINSON & BLUE
246 West Main Avenue
Gastonia, NC 28053
(704) 864-5728
Attorneys for Respondent

*Counsel of Record

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL ACTION NO. C-C-81-0204

PHYLLIS A. ANDERSON,

Plaintiff,

v.

CITY OF BESSEMER CITY, NORTH CAROLINA,

Defendant.

DEFENDANT'S MOTION FOR RELIEF FROM ORDER

(Filed September 23, 1982)

The defendant, the City of Bessemer City, moves the Court, pursuant to Rule 60 of the Federal Rules of Civil Procedure, for relief, on the basis of mistake, from the Court's Memorandum of Decision dated September 16th, 1982, in which the Court directed plaintiff's counsel to draft findings of fact and conclusions of law, if the parties did not resolve this case by October 4th, 1982.

The reasons for defendant's motion are:

1. The case has not been resolved by the parties. The Court has been so informed, by defendant counsel's letter to the Court dated September 23rd, 1982.

2. Findings of fact and conclusions of law drafted by counsel for a party are entitled to less "weight and dignity (than) . . . the unfettered and independent judgment

of the trial judge" because of the adversarial tone of such findings. *Holsey v. Armour & Co.*, — F. 2d —, 29 FEP Cases 1067, 1068 (4th Cir., July 23, 1982) (copy attached), citing *The SEVERANCE,* 152 F.2d 916, 918 (4th Cir., 1945); *White v. Carolina Paperboard Corp.*, 564 F.2d 1073, 1082-83, 16 FEP Cases 44 (4th Cir., 1977); and *Chicopee Mfg. Co. v. Kendall Co.*, 288 F. 2d 719, 724-25 (4th Cir., 1961).

The relief sought by defendant through the instant motion is that the Court modify its Memorandum of Decision so that the findings of fact and conclusions of law be written by the Court, rather than by Counsel for the plaintiff.

This the 23rd day of September, 1982.

CITY OF BESSEMER CITY,
NORTH CAROLINA

By /s/ PHILIP M. VAN HOY
PHILIP M. VAN HOY
400 South Tryon Street, Suite 3022
Charlotte, North Carolina 28282
Telephone (704) 377-5151

By /s/ ARTHUR C. BLUE, III
WHITESIDE, ROBINSON & BLUE
246 West Main Avenue
Gastonia, North Carolina 28053
Telephone: (704) 864-5728

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION

C-C-81-204-M

PHYLLIS A. ANDERSON,

Plaintiff,

v.

CITY OF BESSEMER CITY, NORTH CAROLINA,

Defendant.

ORDER

(Filed October 7, 1982)

Counsel for the defendant has moved for "relief, on the basis of mistake," from the court's memorandum of decision of September 16, 1982.

The memorandum correctly set out the decision of the court. There was no mistake in its form or its content. Counsel for the plaintiff are directed to proceed as provided in the memorandum. When the proposed findings and conclusions have been submitted, comment will as usual then be sought from defendant, so that, in final form, the findings and conclusions may reflect consideration of the input of both sides.

IT IS SO ORDERED, this 7 day of October, 1982.

/s/ JAMES B. MCMILLAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL ACTION NO. C-C-81-204-M

PHYLLIS A. ANDERSON,

Plaintiff,

v.

CITY OF BESSEMER CITY, NORTH CAROLINA,

Defendant.

[PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed November 15, 1982)

Jonathan Wallas and Ronald L. Gibson, Chambers, Ferguson, Watt, Wallas, Adkins & Fuller, P.A., 951 South Independence Boulevard, Charlotte North Carolina 28202, counsel for plaintiff;

Philip M. Van Hoy, Siegel, O'Connor & Kainen, P.C., 400 South Tryon Street, Suite 3022, Charlotte, North Carolina 28285; Henry Whitesides and Arthur C. Blue, III, Whitesides, Robinson and Blue, P.A., 246 West Main Avenue, Gastonia, North Carolina 28052, counsel for defendant.

Before James B. McMillan District Judge

This case was tried without a jury on September 13 and 14, 1982. On September 16, 1982, a Memorandum of Decision was filed announcing the decision of the Court. Thereafter, proposed findings were drafted by counsel for

the plaintiff and an opportunity was provided to the defendant to submit alternative findings or comment on plaintiff's submission. Having now reviewed both parties' proposals, considered all of the evidence, made credibility determinations where necessary and considered the arguments of counsel, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. This proceeding was commenced on May 18, 1981 by plaintiff, Phyllis A. Anderson, pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* (hereafter "Title VII"), seeking relief for violations of Tile VII.

2. Plaintiff is a female citizen and resident of Bessemer City, North Carolina. The defendant, City of Bessemer City, is a North Carolina municipal corporation.

3. During February or early March, 1975, the defendant had a vacancy for the position of Recreation Director. The defendant advertised the position through the local newspaper, the Gastonia Gazette, and by word of mouth.

4. On or about March 16, 1975, plaintiff submitted a letter and resume as her application for the position of Recreation Director.

5. Prior to applying for the job, plaintiff had informally inquired about the job by talking to city council member Mrs. Bowser Boone. Prior to submitting her application, she had also talked with Neil Barnes, the then Superintendent of Water Works for the City. Plaintiff was told by Mr. Barnes that the Recreation Director position had been "wrapped-up" by the ultimate selectee, Don-

ald Kincaid, a male.[1] Despite her conversation with Barnes, plaintiff applied for the position. However, because Barnes had indicated to her that Kincaid would receive the job, plaintiff set forth the following paragraph in her letter of application:

> I realize you will probably be giving stronger consideration for a male to fill this position. In this light, I would request that you review all qualifications equally, realizing women are assuming positions off (sic) leadership and responsibility in industry and government equal to those held by men.

6. The defendant received applications for the Recreation Director job from about eight individuals, each of whom was interviewed by a Committee consisting of Mrs. Boone, Josiah Butler, William McClellan, Frank Nichols, and Timothy Helms. The Committee was appointed by the defendant's mayor, and Mrs. Boone, the only woman on the Committee, was appointed chairperson.

7. The defendant established no written qualifications for the position of Recreation Director, nor were the job duties of Recreation Director provided to applicants or the selection Committee prior to the time the selection was made. There was, however, a clear requirement that the person selected must live within the City or be willing to relocate there. No guidelines to assist the Committee in selecting the new Recreation Director were provided to the Committee or developed by it. Each Committee membr was given one vote, and each member was free to use whatever selection criteria he or she deemed appropriate.

---

[1]After the selection process for the Recreation Director job was completed, Barnes reiterated to the plaintiff his opinion that Kincaid had the position "wrapped-up" all the time.

8. Committee members had access to the applications filed by applicants. Both plaintiff and Kincaid filed written letters of application and resumes and both were interviewed. During her interview with the Committee, plaintiff was asked, in addition to what programs she would implement as Recreation Director, certain specific questions concerning the requirements of the job and her ability to meet those requirements.[2] Mrs. Anderson, for example, was asked (a) if she realized that there would be night work involved, (b) whether she realized that there was a possibility that there would be travel throughout the County and meetings with other directors, and (c) how her husband felt about her applying for the job. Plaintiff was the only female applicant; none of the male applicants for the position were asked these specific questions or similar ones.

9. The general consensus of the Committee was that one applicant, Bert Broadway, who was then employed as a Recreation Director in another city was the most qualified applicant. Broadway, however, was eliminated from consideration during his interview because he indicated he would not relocate to Bessemer City.

10. When the interviews were completed, the Committee voted. The four male members of the Committee

---

[2]Committee member Helms testified at trial that plaintiff began her interview by stating that the Committee would not select her because she was a woman. However, the Court finds that the plaintiff did not begin her interview with such a statement. No other Committee members testified about such a statement. Helms may have been confused by the statement in plaintiff's March 16 letter quoted above in Paragraph 5 or by Mrs. Boone's contention communicated by her to the other Committee members that plaintiff was not selected for the job because of her sex.

voted for Kincaid; Mrs. Boone voted for the plaintiff. All Committee members agreed plaintiff was qualified for the job. The primary reason given by the male Committee members for the selection of Kincaid was the fact that he had a college degree in health and physical education. Mrs. Boone voted for the plaintiff because she felt plaintiff's experience and other qualifications were superior to those of Kincaid. Mrs. Boone also contended that the male members of the Committee had not voted for plaintiff because of her sex. She based her conclusion concerning sex discrimination on the fact that plaintiff had been asked certain questions (see Paragraph 8 *supra*) not asked males which implied a different standard of evaluation was being applied to the plaintiff and the fact that some Committee members seemed to emphasize the traditional male sports portion of the Recreation Director duties.

11. After the Committee's vote, Kincaid was then offered the job which he accepted. After Kincaid was selected he was sent a list of job duties for the Recreation Director position. These duties had not been provided to any of the applicants prior to the interview process.

12. Sometime shortly after Kincaid's selection was made public, the plaintiff talked with Mrs. Boone, who advised plaintiff that she thought plaintiff was the best qualified candidate, that during the selection process some of the Committee members had emphasized traditionally male sports to the derogation of the other duties of the Recreation Director, and that, in Boone's opinion, the Committee had not looked at the total qualifications of the candidates. Mrs. Boone further advised the plaintiff that plaintiff had been asked the questions in her interview about night

work, the necessity for travel and her spouse's reaction to her seeking the Recreation Director job which had not been asked of any of the male applicants in their interviews.

13. Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission on March 31, 1975. Notice of Right-to-Sue was issued February 19, 1981, and plaintiff initiated this proceeding within ninety days of her receipt of that Notice.

14. The plaintiff contended at trial that she was more qualified for the Recreation Director position than Donald Kincaid and that she had been denied the job because of the pre-conceived sexually discriminatory attitudes and predelictions of the male members of the Committee. The defendant asserted at trial that Kincaid was the more qualified, that the Committee members had no pre-conceived sexually stereotypical notions and that their selection was based solely on merit. Having evaluated all the evidence, the Court concludes (a) that the job of Recreation Director was not one necessarily requiring a college degree in health and physical education (a degree possessed by Kincaid and not by the plaintiff), but rather was a job requiring a diversity of talents and skills; (b) that the contention of the defendant that Kincaid was selected because of his particular degree is not supported by the evidence; (c) that if the total qualifications of the candidates are fairly evaluated the plaintiff was the most qualified applicant[3] for the job; and (d) that the plaintiff was denied the job because of her sex.

---

[3]The qualifications of Mr. Broadway, who was eliminated by all members of the Committee because he was not willing to relocate, have not been considered by the Court in making this finding.

15. The first step in deciding who was the most qualified applicant for the job is to review the stated or implied duties and responsibilities of the Recreation Director position. The Court's task is rendered more difficult because the defendant established no written qualifications or criteria for the position prior to Kincaid's selection and only a limited list of job duties were sent to Mr. Kincaid after his selection. However, from the testimony of the Committee members, the list sent to Mr. Kincaid and the other evidence, the Court concludes the job of Recreation Director was to fashion and implement a well-rounded recreation program for all of the citizens of the community. The Recreation Director was to prepare and implement programs in baseball, basketball, volleyball, swimming and similar sports as well as in art, music, dance, drama, crafts and similar activities for persons of all ages and interests. The position required the ability to develop various types of recreational programs, to teach, to manage and to communicate with people of all ages, backgrounds and interests. In addition, it was likely the Recreation Director would have to manage swimming and other community facilities, select umpires, life guards and perhaps instructors for various activities, develop and handle budgets and perhaps funds and make plans for future recreational facilities. The Court concludes that the task of the selection Committee was to choose the candidate whose education, training, background, work experience and other life experiences indicated would best be able to handle the diverse duties of the job.

16. A comparative review of the qualifications presented by the plaintiff to the Committee and those presented by Donald Kincaid demonstrates that Ms. Anderson's qualifications were superior to those of Mr. Kincaid.

(a) *Education*

Plaintiff received a Bachelor of Science Degree from Sacred Heart College in 1963 or 1964 (a junior college degree) and also received a BA Degree from Sacred Heart in elementary education in 1973. In addition to her college degrees, by March 1975 plaintiff had taken government and history courses and a decoupage course at Gaston College in 1973 and 1974, and had taken logic and guidance courses in 1974 from Belmont Abbey College.

Mr. Kincaid's post high school education as of March 1975 was a B.S. Degree in health and physical education which he received in May 1974 from Appalachian State University.

(b) *Certification in Recreational Direction*

As of March 1975, the plaintiff had a North Carolina State Recreational Director certificate which she received about 1957.

As of March 1975, Mr. Kincaid had no recreational director certification.

(c) *Employment History*

Plaintiff was in charge of supervising activities in the Recreation Department of Broughton Hospital from about 1956 through about 1957. In her job at Broughton she planned various activities including dances and other arts and helped supervise various ball games and similar activities. In addition, plaintiff had worked for a group of doctors as a receptionist and bookkeeper and had worked as a part-time sales clerk for Belk Stores while she went to school from 1961 to 1963. In her job with the doctors

she had to manage funds and was often in contact with the public. From about 1963 to 1973, plaintiff worked as a substitute teacher in Gaston County Public Schools teaching in all grades. While working as a school teacher, plaintiff had to plan activities for school children of all ages inside and outside the school, teach physical education, music and art, as well as the normal academic subjects. Beginning about 1973, plaintiff began teaching third grade at Carr School in Dallas, North Carolina where she was teaching as of March 1975.

Mr. Kincaid engaged in student teaching in Mountain City, Tennessee during the winter of 1973-1974 as part of his college work. Following his graduate from college in May 1974, Kincaid worked for Commercial Credit Corporation in the finance department. He indicated on his application for the Recreation Director job that he gained experience working with the public while at Commercial Credit. Kincaid had also sold life insurance at some time prior to March 1975 although this experience was not listed on his resume.

(d) *Experience in Recreational Director Work*

Plaintiff had worked in the recreation department of Broughton Hospital for about two years as discussed above planning various activities from sports to music and the like and supervising other employees.

As of March 1975, Kincaid had no experience in recreational direction; he had never supervised any employees.

(e) *Supervisory Experience*

Plaintiff had supervised other employees while working with Broughton Hospital. She also had years of ex-

perience supervising children in a variety of activities including sports. Finally, the offices she held in various civic organizations required her to lead various programs and activities.

Mr. Kincaid had no supervisory work experience and had limited supervision of children during his student teaching and with the little league.

(f) *Civic Activities*

The plaintiff listed on her job application an extensive list of civic activities she had engaged in prior to March 1975. These included her membership in the Exchangette Club when she lived in Tennessee for which she organized various activities for the members and was in charge of meetings. She served as President, Vice President as well as chairwoman of various committees for the Exchangette Club. In addition, plaintiff had been active in the Jaycette Club in Bessemer City as well as the Bessemer City Order of the Eastern Star, where she served as an officer. These extensive public and civic activities involved the plaintiff in many facets of the community and also gave her opportunities to engage in public speaking.

Kincaid listed no civic activities in his resume. He testified that after his college graduation he became involved in coaching little league basketball in a Bessemer City Optimist Club league.

(g) *Experience and Activity with Respect to Recreational Matters*

Prior to March 1975, the plaintiff had been personally active in a number of sports. She had played basket-

ball and softball in her school days and also had been involved in her own children's activities in local athletics. In addition, as part of her school activities she had planned physical education activities and had actively supervised children on the playground playing various sports. Plaintiff specifically noted on her resume that she could play the piano, that she had experience in music direction and that she had taken a decoupage course. She had a basic knowledge in all sports, had experience in umpiring, had first aid knowledge and was an experienced public speaker. The plaintiff in her civic and school activities (such as school trips) helped to raise funds and gained experience in budgeting and bookkeeping. While working at Broughton Hospital and teaching she had instructed adults and children in sports and arts and crafts. She stated on her resume that she enjoyed indoor and outdoor sports and that she was in good health.

Kincaid had been active in all major sports including basketball, football, baseball, volleyball, track and soccer as he grew up, had played certain sports in high school and had engaged in intramural sports activities at Appalachian State. He had also taken courses as Appalachian State in teaching others how to perform these sports activities as well as courses in public speaking, first aid and organizing and administering physical education.[4] His resume indicates he was interested in coaching, reading, and music.

---

[4]The Committee did not ask Kincaid about his college course work during his interview. Such a failure would imply that the Committee did not feel the type of courses he had taken were important.

17. The Court concludes from a review of the evidence that the plaintiff was more qualified than Donald Kincaid for the job of Recreation Director. Plaintiff had a wealth of employment and other experience in a wide ranging variety of jobs and civil activities. She had planned and implemented a variety of sports, arts and other activities for persons of various ages. She had worked with children in school and with adults at Broughton and in her civic activities. She had prepared and managed budgets and money and had developed public speaking and other communicative skills. She was a mature and experienced worker and mother. She had a lifetime interest in a variety of sports, had participated and instructed in various sports and was interested in sports and the other activities which would be part of the Recreation Director job. The plaintiff had a college degree and had also taken additional courses to broaden her background and skills.

Comparatively, Mr. Kincaid was personally skilled in sports and had taken courses in teaching sports and other activities. His work history was limited, however, as was his experience in working with a variety of people or in managing and supervising facilities and people. His only job of any consequence prior to March 1975 was with a finance company and he had virtually no experience in supervision or management. While Kincaid had a health and physical education degree, the plaintiff's teaching degree, work experience and other qualifications gave her not only skills in teaching and planning sports activities but also provided additional skills in the other areas called for by the job.

18. The Court has also reviewed all of the evidence and has concluded that plaintiff was not selected for the Recreation Director position because the male members of the Committee were predisposed to hire and preferred to hire a male for the job. The Court has reached this finding by reviewing the entire record, especially the various reasons articulated by the defendant and the Committee members for selecting Kincaid over the plaintiff. This evidence, detailed below, indicates that plaintiff was not selected for the job because of her sex and the Court so finds. The Court bases this finding on the following:

(a) No selection criteria were devised for the position, and the Committee members used various conflicting standards to decide who to select. While the fact that no standards were established for filling the position does not violate the law, the lack of any articulated criteria left the way open for Committee members to allow their own improper biases (here preference of a male for the job) to affect their votes. The evidence catalogued below indicates that the male Committee members preferred a man for the job.

(b) The Committee asked the plaintiff certain stereotypical questions (See Paragraph 8 *supra*) which were not asked of the male applicants for the job. These questions as well as other evidence implied a belief that a woman should not work at night in a job such as Recreation Director because it would upset her family life. The particular questions standing alone would be of little significance; however, the fact that only the plaintiff was asked them tends to show a different standard was used to evaluate female applicants. The plaintiff was not the

only applicant with a family. Mr. Kincaid had a wife and children. The fact that the plaintiff (but no males) was asked these questions tends to indicate the use of a different standard for women.

(c) The most frequently articulated reason for selecting Kincaid was that he had a degree in health and physical education while the plaintiff did not. However, the Committee's first choice, Mr. Broadway, had no college degree at all, much less one in physical education. The actions of the Committee (in initially selecting Broadway) as well as the trial testimony make it clear that a college degree in physical education was neither a stated prerequisite for the position nor necessary for the proper performance of the Recreation Director job. When Committee members were asked about the fact Mr. Broadway had no college degree, they replied that he was their top choice because of his work experience. As discussed above, plaintiff's work experience and other qualifications were superior to those of Kincaid. They were simply ignored by a majority of the Committee. The Court finds that the emphasis on Kincaid's degree was a post-hoc attempt by the defendant to justify a decision that was really based on sexual stereotype and bias and is merely a pretext articulated to mask discrimination.

(d) Several Committee members had worked with Kincaid through the all-male Optomist little league. This prior contact may have tilted them toward Kincaid. Mr. Butler had mentioned the Recreation Director vacancy to Kincaid. More important, Committee members Butler and Nichols emphasized throughout the selection process the traditionally male sports that would be only a part of the Recreational Director job. Nichols called the job "athletic director".

(e) Butler testified that he had solicited applications from two males (including Broadway) for the job. However, despite the fact that he stated he knew two women well qualified for the Recreation Director position, he did not seek applications from them.

(f) Although Kincaid was never asked about his college curriculum, Butler testified that he assumed Kincaid had received college training for the Recreation Director job. Butler voted for Kincaid even though he knew Kincaid had never prepared a budget, supervised any employees or even worked in a recreation program. Similarly, Butler testified he assumed that the two women he believed were qualified for the Recreation Director job would not have been interested in the job because they would have had to take a pay cut. He made no such assumptions as to the males he suggested apply for the job.

(g) Committee member Nichols made it clear that he preferred a man for the job. He was concerned about the job's long hours and stated "it would have been hard for a lady" to perform the work. He specifically stated he would not want his wife to have the job.

(h) Although one Committee member (Helms) claimed to be influenced by the program presented by Kincaid for the job, another Committee member (McClellan) felt the plaintiff had presented an equally good program.

19. The Court thus finds that the male members of the selection Committee did not make a fair and even-handed evaluation of the candidates. They asked the plaintiff questions not asked the males, encouraged men to apply but did not so encourage admittedly qualified

women, alternatively emphasized education or experience depending on which emphasis benefitted the pertinent male, made favorable assumptions about Kincaid's qualifications while ignoring the plaintiff's vast experience and superior qualifications, and mischaracterized the plaintiff's interview and program. The Court concludes she was not selected because of her sex.

20. Plaintiff suffered monetary loss as a result of the denial of the recreation director job. Her evidence showed that her earnings from March 1975 through trial were $65,402 while the earnings of Mr. Kincaid for the same period were $95,799. She also suffered the loss of use of the difference in earnings.

CONCLUSIONS OF LAW

1. This action is properly before the Court, the Court has jurisdiction of this action under Title VII, and all procedural requirements of Title VII have been met.

2. The evidentiary standard and allocation of burden of proof applicable to this case is set forth in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), where the Supreme Court refined the basic allocation of burdens and order of presentation of proof set forth in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). Plaintiff has the burden of proving by the preponderance of the evidence a *prima facie* case of discrimination. If the plaintiff succeeds in proving a *prima facie* case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for plaintiff's rejection. 411 U.S. at 802. The ultimate burden of persuading the Court that defendant discriminated against plain-

tiff remains with plaintiff. *Burdine*, 450 U.S. at 253. Under *Burdine*:

> The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position, for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination. . . . Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the [applicant]. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case. 450 U.S. at 253-54.

2. Plaintiff's evidence satisfies her burden of showing that she applied for the position, was qualified, but "was rejected under circumstances which give rise to an inference of unlawful discrimination." *Burdine*, 450 U.S. at 253.

3. Plaintiff was rejected under circumstances which give rise to an inference of unlawful discrimination. She was asked sex stereotypical questions as set forth more completely above that were not asked of the other applicants. Plaintiff's combination of education and experience made her the best qualified candidate for the particular job, particularly after Mr. Broadway was eliminated from consideration because he would not relocate to Bessemer City.

4. Once plaintiff has established a prima facie case of unlawful discrimination the burden shifts to the defendant:

> . . . to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. *Burdine*, 450 U.S. at 254-55.

5. The defendant's articulated reason for plaintiff's rejection is that Mr. Kincaid had a college degree in health and physical education and college courses which plaintiff did not possess and that Mr. Kincaid was more qualified than plaintiff. This production satisfies the defendant's burden of articulation. If the Court finds that the defendant has produced a legally sufficient and nondiscriminatory reason for not selecting plaintiff, plaintiff must have a full and fair opportunity to demonstrate pretext. *Burdine*, 450 U.S. at 256. Plaintiff may demonstrate that the proffered reason was not the true reason for her rejection either (1) directly, by persuading the Court that a discriminatory reason more likely motivated the defendant; or (2) indirectly, by showing that the defendant's proffered explanation is unworthy of credence. *Burdine*, 450 U.S. at 256. *McDonnell-Douglas*, 411 U.S. at 804-805. Plaintiff may meet her burden by offering additional evidence or may demonstrate pretextuality from

the evidence and inferences properly drawn therefrom which were presented as part of her *prima facie* case.

6. The Court, applying the standards set forth above, concludes that the defendant's stated reasons for plaintiff's rejection are pretextual. The defendant applied the college degree "requirement" to support its decision to hire Mr. Kincaid, but relied on experience to support its initial decision to hire Mr. Broadway. The Committee asked plaintiff sexually stereotypical questions not asked of male applicants. One Committee member solicited applications from males but did not solicit them from women he deemed qualified. Another, by indicating it would be very hard for a woman to do the job, in effect required a higher standard of women. In the interviews, some male Committee members emphasized the traditional male sports despite the fact the recreation director job involved working with a variety of programs, sexes and ages. Assumptions were made that favored Kincaid (such as what courses he had taken and what he would have learned in the courses) while the plaintiff's experience was ignored. For all of the above reasons and for the reasons set forth in the findings of fact above, the Court concludes the reasons advanced by defendant for Kincaid's selection are pretextual.

Absent the biases and sexual stereotypes which influenced the Committee's decision, plaintiff would have been hired as Recreation Director since she was the best qualified candidate. The sexual biases of the Committee members played a substantive and decisive role in the hiring decision. *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 287 (1977).

7. Where selection is based on subjective factors, a defendant's articulations must be carefully scrutinized. In *Coble v. Hot Springs School District No. 6*, 682 F.2d 721 (8th Cir. 1982), the selectee was considered to be the better qualified candidate on the basis of certain subjective factors, workshop experience and availability as measured by attendance. This explanation satisfied the defendant's burden of production by articulating legitimate, nondiscriminatory reasons for plaintiff's rejection. In attempting to rebut defendant's articulation, however, plaintiff argued that the true reason she was rejected was because she was a woman with children and the selecting officials assumed that her family responsibilities would interfere with her work performance. During her interview for the job at issue, plaintiff Coble and the selecting officials discussed her attendance record, the number of days missed attributable to family illness, her children and their ages, and whether she could handle the long hours required by the position. The District Court found that defendant's proffered reason for the non-selection of plaintiff was the true reason for the employment decision. The Court of Appeals reversed this finding as clearly erroneous and remanded the case with directions to grant appropriate relief:

> Although not illegal per se, subjective promotion procedures are to be closely scrutinized because of their susceptibility to discriminatory abuse. The mere fact that the subjective process is intended to recognize merit does not necessarily alleviate its susceptibility to discriminatory abuse. *When the evaluation is in any degree subjective and when the evaluators themselves are not members of the protected minority, the legitimacy and undiscriminatory basis of the articulated reason for the decision should be subject to*

particularly close scrutiny by the trial judge (emphasis supplied) 682 F.2d at 726-27, citing *Royal v. Missouri Highway & Transportation Comm'n,* 655 F.2d 159, 164 (8th Cir. 1981).

In *Muntin v. California Parks and Rec. Dept.,* 671 F. 2d 360 (9th Cir. 1982), a female plaintiff sought a traditionally male deckhand position. The hiring officer testified during depositions and at trial that he would not want to work with women deckhands, that he did not think women should be standing night watch, and that there would be sexual problems with a woman working as a deckhand. The Court concluded that this testimony, as a matter of law, demonstrated a discriminatory animus. 671 F.2d at 362. See also, *Williams v. Hoffmeister,* 520 F.Supp. 521, 536 (E.D.Tenn. 1981); and *EEOC v. Spokane Concrete Products,* 534 F.Supp. 518, 522 (E.D.Wash. 1982).

8. A close examination of the evidence shows that the hiring committee in this case was motivated by discriminatory reasons. See *Stone v. D.A.&S. Oil Well Servicing, Inc.,* 624 F.2d 142 (10th Cir. 1980); *Sherkow v. State of Wisconsin,* 630 F.2d 498, 503 (7th Cir. 1980). The type of questions asked only the plaintiff and the other evidence discussed above demonstrate the Committee had predetermined that a male was to be favored for the job. Only plaintiff was asked questions about what her spouse thought of the job and concerning how her family would be affected if she worked nights. Moreover, the plaintiff's qualifications for the job were superior to those of Mr. Kincaid, a young man fresh out of school with little work experience. Mr. Kincaid was chosen, because the majority of the Selection Committee believed only a male could supervise "male" sports and because the "male oriented"

aspects of the program were improperly emphasized. As the Fifth Circuit summarized:

> Courts must be extremely careful to determine that the reasons given for selecting a male applicant over a female applicant are not simply a ruse disguising true discrimination. Courts must further carefully scrutinize the employer's explanations for its conduct once the aggrieved employee has proved a prima facie case of discrimination. If the capacity or competency distinction upon which the employer's selection is based inheres in the nature of an employee as a man or a woman, or typical culturally-based concepts of the abilities of people to perform certain tasks because of their sex to creep into its thinking, then Title VII will come to the employee's aid. The line that must be drawn is a fine one—because interpreting an employer's motives on the basis of its actions is at times hazardous, especially when there exists potentially valid and seemingly plausible business explanations as to such actions which in fact mask a true intent to discriminate.

Pond v. Braniff Airways, Incorporated, 500 F.2d 161, 165-66 (5th Cir. 1974). See also *Woody v. City of West Miami,* 477 F.Supp. 1073, 1079-80 (S.D.Fla. 1979). Careful review of the employer's explanation here demonstrates it was plaintiff's sex, not her alleged lack of relative qualifications, which led to her being denied the position.

9. The Court concludes, as a matter of law, that plaintiff has been discriminated against because of her sex in violation of Title VII, and is entitled to be made whole. *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975); *White v. Carolina Paperboard Corp.,* 564 F.2d 1073 (4th Cir. 1977). Plaintiff is entitled to back pay based on the difference between her earnings and Mr. Kincaid's earn-

ings in the position.[5] See *EEOC v. Korn Industries, Inc.*, 662 F.2d 256 (4th Cir. 1981). Under the law of this Circuit, the approprioate pre-judgment interest rate is not necessarily the legal rate of the state where the violation occurred. *EEOC v. Liggett- & Myers, Inc.*, __ F.2d __ (No. 81-2186, 4th Cir. 1982). The purpose of the back pay provision of Title VII is to "mae whole" the victims of discrimination. *Albemarle Paper Co. v. Moody, supra.* However, it does not fully restore a discrimination victim merely to pay that person her back pay, dollar for dollar, without taking into account the effectsof inflation, among other factors. For example, a dollar earned in 1975 is worth only about $.55 if not paid until 1982. In order to give a dollar the same purchasing power today as it had in 1975, a payment of $1.81 would be required. Consequently, the Court concludes that the "make whole" principle underlying Title VII requires, at the very least, that Ms. Anderson be given an amount of back pay that has the same purchasing value as the salary she should have received during each of the years from 1975-1982.

The most commonly used index to calculate such changes is the Consumer Price Index (CPI). An adjustment based on the CPI will give plaintiff 1982 dollars worth what she would have received absent discrimina-

---

[5]Normally, plaintiff would also be entitled to receive the Recreation Director job. However, the plaintiff indicated at trial that, given the passage of time, she would not insist that Mr. Kincaid be replaced. The Court agrees that Mr. Kincaid is an innocent victim of defendant's discrimination and that, no "bumping" should be ordered. Although there are pursuasive arguments that front pay should be substituted for reinstatement, the Court concludes back pay with appropriate interest and counsel fees is the most equitable remedy at the present time.

tion and is especially appropriate in this case where plaintiff is not awarded reinstatement or front pay.[6] The plaintiff's back pay[7] with adjustment thus is $41,830, calculated as follows:

Year	Kincaid's Wages	Anderson's Wages	Difference	[8] Adjustment Factor	1982 Dollar Amount
March 1975 to Dec. 1975	$ 6,679	$ 1,827	$4,852	(1.81)	$8,782
1976	9,885	6,833	3,052	(1.71)	5,219
1977	10,169	7,890	2,279	(1.60)	3,646
1978	12,158	8,776	3,382	(1.49)	5,039
1979	13,286	10,333	2,953	(1.34)	3,957
1980	15,031	10,591	4,440	(1.19)	5,284
1981	17,451	11,648	5,803	(1.08)	6,267
Jan. 1982 to date of trial	11,140	7,504	3,636	(1.00)	3,636
				Total back pay expressed in 1982 Dollars	$41,830

---

[6]This adjustment awarded by the Court is in lieu of normal pre-judgment interest. Alternatively, the Court would award pre-judgment interest at the appropriate rate.

[7]The evidence of Mr. Kincaid's wages was presented as a lump sum at trial. In a letter from Mr. Van Hoy to Mr. Wallas dated October 28, 1982, defendant provided a more detailed breakdown of the pertinent figures. The figures contained in that October 28 letter are hereby made a part of the record in this case.

[8]As discussed above, interest is awarded to equal inflation as measured by changes in the Consumer Price Index (CPI). For example, in 1975, the CPI was 161.2, while by 1982 it had reached 292.8. Interest on the 1975 loss of $4,852 is thus calculated by multiplying the principal of $4,852 by a factor of 1.81. Similar calculations are made for the other years using the then pertinent CPI indices as set forth:

(Continued on following page)

10. Plaintiff, as prevailing party, is entitled to recover her costs and expenses, including reasonable attorney's fees. A separate order is being entered herewith concerning fees, costs and expenses.

11. Plaintiff is also entitled to injunctive relief prohibiting future discrimination.

12. A Judgment will be entered with these Findings of Fact and Conclusions of Law.

This ____day of _____, 1982.

James B. McMillan
UNITED STATES DISTRICT JUDGE

(Continued from previous page)

Year	Consumer Price Index (1967=100)	Inflation Adjustment Factor (Nov. 1982=1.00)
1975	161.2	1.81
1976	170.5	1.71
1977	181.5	1.60
1978	195.3	1.49
1979	217.7	1.34
1980	247	1.19
1981	242.3	1.08
1982	292.8	1.00

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA CHARLOTTE DIVISION

CIVIL ACTION NO. C-C-81-0204

PHYLLIS A. ANDERSON,
Plaintiff,

v.

CITY OF BESSEMER CITY,
NORTH CAROLINA,
Defendant.

DEFENDANT'S RESPONSE TO PLAINTIFF'S FINDINGS OF FACTS AND CONCLUSIONS OF LAW

(Filed December 10, 1982)

In accordance with the Court's Memorandum of Decision which followed the trial of this action, plaintiff's counsel has drafted Findings of Fact and Conclusions of Law. By its Order of November 18th, 1982, the Court has invited the defendant to respond to the plaintiff's findings and conclusions, which defendant does by the matters set out below. References to the record are abbreviated herein, "F&C" for findings and conclusions, and "Tr." for trial transcript, immediately followed by the page references.

I. SELECTION CRITERIA UTILIZED BY THE SELECTION COMMITTEE

The findings and conclusions indicate, in reference to the work of the selection committee which chose Donald Kincaid over the plaintiff, that no selection criteria were devised (F&C 14), that various conflicting selection standards were used (F&C 14), that no standards were established (F&C 14), and that the selection of Kincaid over

the plaintiff was based on subjective factors (F&C 22). These findings, each of them and they collectively, are not supported by the record, as the testimony of the four members who first voted for Kincaid indicates:

A. Josiah Butler: Butler's vocation for six years was that of a high school athletic coach. For eight years, he served as Youth Activities Director of the Bessemer City Optimist Club, which during that time had the entire responsibility for the operation of Bessemer City's recreation program. In addition, he personally holds a college degree in physical education (Tr. 92, 96). His personal education in physical education provided him with direct, personal knowledge of the curriculum of a physical education graduate such as Donald Kincaid (Tr. 97, 108). Also, he had personally worked with Mr. Kincaid in the Bessemer City recreational program specifically, in such activities as coaching, organizing programs, and scheduling of events (Tr. 95, 107-108).

B. Harold McClellan: At the time of the selection of the City Recreation Director, in 1975, Mr. McClellan was a member of the Recreation Committee of defendant. He also then had responsibility for the Bessemer City United Fund's recreation center (Tr. 111).

C. Eugene Nichols: In 1975, Mr. Nichols was the Youth Director of the Bessemer City Optimist Club, which then managed the defendant's recreation program. In addition, he was on the defendant's Recreation Committee (Tr. 116-117).

D. Timothy Helms: Mr. Helms was a member of defendant's City Council in 1975 (Tr. 127).

The significance of the above experiences of the selection committee members is that each, in fact, had direct,

personal experience and responsibility for running recreation programs, in the City of Bessemer City specifically. From their respective duties and experiences, each knew personally what programs and responsibilities were involved, and they thus were each qualified to invoke their own knowledge in judging the qualifications of the various individuals who applied for the job of Recreation Director. Since their individual training and/or experience were directly related to the position to be filled, their individual and collective determinations of the qualifications of the applicants were not "subjective," but were instead based on specific personal experience in, and in some cases training for, the very position for which they interviewed applicants. To conclude otherwise would be analogous, for example, to concluding that the Board of Law Examiners is not qualified, through its charge or through its collective education and experience, to rule on the qualifications of applicants for the bar, because the Board is not told what specific questions to ask of applicants.

II. NEIL BARNES PURPORTED CONVERSATIONS WITH THE PLAINTIFF CONCERNING THE ALLEGED PRESELECTION OF KINCAID

The plaintiff's findings and conclusions emphasize an alleged conversation between the plaintiff and Neil Barnes, for the proposition that the selection of Kincaid was a fait d'accomplis before the interview of the plaintiff and the other applicants (F&C 2-3). This is neither probative nor relevant. Barnes was not on the selection committee (Tr. 6, 8, 28). The plaintiff herself admitted that Barnes did not tell her that anyone on the selection committee had told him that Kincaid had been anointed for the position before the job interviews were conducted (Tr. 28-29). In short, this testimony indicates no bias, nor even anything

at all about the selection process which involved anyone who played a part in it. Furthermore, Barnes was on plaintiff's witness list, was available to testify throughout to substantiate plaintiff's burden of proof, and yet was not called to testify.

III. INTERVIEW QUESTIONS ABOUT APPLICANTS' FAMILIES' REACTION TO WORKING AT NIGHT

Questions about applicants' amenability to night work were job-related and relevant, since the job required duty at night, and since the members of the selection committee knew that night work was required from their respective personal experiences with the Bessemer City recreation programs (ref: I., *supra*).

Plaintiff's findings and conclusions declare repeatedly that this "stereotypical" line of questions by the selection committee was asked of the plaintiff, and *only* of the plaintiff (F&C 4-5, 6, 15, 17, 19, 23, 24). In fact, this finding is not supported by the record:

1. The plaintiff did not specify *who* asked her about work at night, although she claims to remember that the question was asked of her, and she further claims to remember exactly how it was asked (Tr. 8, 29-30). She had no personal knowledge of whether similar questions were asked of other applicants (Tr. 30). She did admit, however, that the elusive question was posed to her by only one of the five-member committee (Tr. 31).

2. Plaintiff's witness Boone never testified that other applicants were not asked about family reactions to night work; when asked about this, her reply was "Not that I recall" (Tr. 48).

3. Ms. Boone specifically testified that *she herself* asked Kincaid, the successful applicant, about his *own* family's amenability to his working at night (Tr. 66).

4. Josiah Butler testified that questions concerning willingness to work at night were asked, by the selection committee, of *both* the plaintiff and the successful applicant, Kincaid (Tr. 101).

5. Eugene Nichols confirmed that the night work question or questions were asked of all applicants (Tr. 119).

In sum, there is no evidence to support that propositions that (1) this line of inquiry by the selection committee was not job related, or (2) that the plaintiff was subjected disparately to this selection criterion. This finding is a touchstone to this case, since it is the only purported evidence of disparate treatment of the plaintiff. Permitting it in the findings and conclusions would not only be an *ipse dixit;* in fact, it is directly contradicted by the record.

IV. KINCAID'S PHYSICAL EDUCATION DEGREE AS A MAJOR SELECTION CRITERION

Plaintiff's findings and conclusions indicate that defendant's contention "that Kincaid was selected because of his particular degree is not supported by the evidence" (F&C 7). Four of the five members of the selection committee specifically testified that this was their respective primary reason for the selection of Kincaid. Furthermore, to conclude that the degree was not an important credential, for the particular position of municipal recreation director, is to assert, implicitly, that a music degree does not prepare one to be a musician, that an engineering degree does not prepare one to be an engineer.

The importance of a college degree for the spcific position applied for is patently apparent, and yet the significance of this credential is not addressed in the plaintiff's findings and conclusions.

The draft findings and conclusions emphasize the education of the plaintiff incorrectly both as to factual findings and to the conclusions to be drawn therefrom (F&C 9). She is credited with a bachelor of science in 1963 or 1964 from Sacred Heart College. In fact, she testified that this was an associate degree (Tr. 36). In addition, several sentences are devoted to her other education, including a B.S. in 1973, and other non-degreed courses in such matters as government, history, logic, and decoupage (F&C 9).

By contrast, Mr. Kincaid's higher education is dismissed by a single sentence: "Mr. Kincaid's post high school education as of March 1975 was a B.S. Degree in health and physical education which he received in May 1974 from Appalachian State University (Tr. 9). The extensive preparation for a recreator's position which was entailed in earning that degree was put on the record, but is dismissed with little reference or comment (Tr. 9-13).

In fact, the record paints a vastly different picture of courses completed by Kincaid which are patently and directly related to the job position which is the subject of this litigation:

1. Numerous courses in team sports, including how to teach and evaluate sports (Tr. 70, 83-84).

2. Courses in the teaching of physical education to elementary students (Tr. 72).

3. Courses in education of secondary students, with emphasis on teaching physical education (Tr. 72-73).

4. First aid (Tr. 72).

5. Organizing and administering physical education, including, for physical education facilities specifically, such matters as budgeting, organizing sports leagues and programs, purchasing, insurance, maintenance, and the planning and developing of facilities (Tr. 73).

In addition, Kincaid had specific educational training, as part of his degree program, in assisting and student teaching, in physical education specifically, in Mountain City, Tennessee and Boone, North Carolina (Tr. 73-84). He had also worked, in physical education, with the handicapped (Tr. 87).

VI. THE RELATIVE RECREATION-RELATED EXPERIENCE OF THE PLAINTIFF, VIS A VIS KINCAID

The plaintiff's findings and conclusions indicate that the plaintiff spent "about two years" at Broughton Hospital, "supervising" other employees in recreational activities (F&C 10). Also noted is that the plaintiff had a "basic knowledge" of sports, umpiring experience, first aid knowledge, and had participated in, and is interested in, various sports (F&C 12-13). Her alleged "supervisory" experience is addressed, *infra*, at VII. No reference is made to the impeachment of her testimony about recreation experience, which includes, *inter alia*, the following:

1. She in fact had no umpiring training or experience (Tr. 25).

2. She had no experience or training in organizing sports leagues (Tr. 24-25).

3. She had no training or experience in the treatment of athletic injuries (Tr. 25).

4. She had no academic courses in the rules of team sports (Tr. 26).

5. She had no courses in budgeting for sports and recreation program (Tr. 26).

In addition, there is no evidence that she had any educational training whatsoever in physical education at all, other than that covered in her general training to be an elementary teacher. All of this lack of training and experience stands in contrast to that of Mr. Kincaid, and yet is not addressed in plaintiff's findings and conclusions, for the reasons set out in V. above as to formal education, and as to the following additional matters concerning Kincaid's own experience in sports and recreation:

1. Participation in organized football, from age 10 through high school, on the very playing fields he now supervises (Tr. 74).

2. Five years of organized team basketball, in Bessemer City specifically (Tr. 74).

3. Organized team baseball, from age 6 through age 14 (Tr. 75).

4. Coaching of players aged 8 through 13 in the sport of basketball, again, in Bessemer City specifically (Tr. 75-76).

VII. THE PLAINTIFF'S PURPORTED SUPERVISORY EXPERIENCE IN RECREATION

Much emphasis is placed on the plaintiff's experience at Broughton Hospital. It must be, to try to prove she had any supervisory experience in recreation activities, to overcome Kincaid's advantages in this field in training

and experience. Plaintiff's findings and conclusions indicate she had "about two years" experience at Broughton, "supervising" other employees (F&C 10). Also, it is alleged that plaintiff " . . . was in charge of supervising activities in the Recreation Department of Broughton Hospital from about 1956 through about 1957" (F&C 9).

The record does not bear out these allegations, as to either breadth or duration. Plaintiff's own testimony is that she worked at Broughton "I think about 1956, '57. I'm not sure exactly which *year* it was. It was *one* of those years" (Tr. 15; emphasis supplied).

Further, it is alleged that she "supervised" while at Broughton, but the record clearly implies that her supervision was of patients, not employees:

"Q Ms. Anderson, one of the factors you mentioned was your ability to supervise. In what activities have you gained this experience or had you gained this ability prior to 1975?"

"A Well, in my job at Broughton Hospital, I had to supervise adults there—some young adults but, in particular, older adults,—in various activities" (Tr. 23).

Even if it be assumed, for sake of argument, that she in fact claimed to supervise in an employer-employee sense, she lacked the recognized emoluments of supervisory authority when at Broughton: she had no authority to hire, no authority to discipline, and no authority to discharge (Tr. 34).

In addition, the plaintiff's findings and conclusions fail to indicate the *passage of time* since her purported supervision of recreation at Broughton; this experience, limited as it was, was at least *18 years* prior to her applica-

tion for the recreation director's job in 1975. It was so far distant in time, in fact, that she could not even remember her job title when employed at Broughton (Tr. 35). This omission of the temporal distance is compounded by the mischaracterization of both her length of employment at Broughton and her duties while there. Kincaid, by contrast, was educated and experienced in recreation up to the very date of his hire.

By contrast, the plaintiff's findings and conclusions indicate that Kincaid had no experience in recreational direction, no supervisory work experience, and virtually no experience in supervision and management (Tr. 10, 11, 14). Given the misrepresentations described above, this if true would establish no contrast between the plaintiff and Kincaid. In fact, the representations of Kincaid's experience in recreation direction and supervision are not accurate, for the reasons set out elsewhere herein.

VIII. PLAINTIFF'S "PROFESSIONAL CERTIFICATION"

Much ado is made of the plaintiff's "professional certification" as a recreator, and the fact that Kincaid had no such certification at the time he applied for the job of recreation director (F&C 9). In fact, the record indicates, through the plaintiff's own testimony, that no experience was required to become thus certified, that her only purported qualification for the certificate was her time at Broughton Hospital (discussed herein at VII), that no test was required to get the certificate, (or that she does not remember whether a test was required), and that she had no idea whether the certificate was still active (Tr. 23, 36-37). To credit this certification as a job credential, while

minimizing the B.S. degree of Kincaid in the specific discipline of the job position, a degree which he had received only one year before and which was supported by a lifetime of sports experience, is patently unjustified, both in terms of the record and of logic.

IX. LENORA BOONE'S CREDIBILITY

The plaintiff's findings and conclusions discredit the male selection committee's clear testimony that they relied on job-related criteria in filling the position at issue. By contrast, Lenora Boone's testimony is fully credited, with no explanation of her biases demonstrated on the record:

1. She testified that she told the plaintiff male applicants were not asked about their families' reactions to working at night, while admitting she herself pursued this subject with Kincaid (Tr. 66).

2. She sought out the plaintiff before the interviews and discussed the position with her (Tr. 54-55).

3. She told Josiah Butler she would not vote to select Kincaid, before the interviews were conducted, because of a bias against Kincaid's family (Tr. 61-62).

4. She indicated her belief that the choice would be between selecting Kincaid or the plaintiff, before the interviews were conducted, according to testimony she did not contradict (Tr. 62).

5. She said Kincaid was her own third choice, despite her prejudice against his family (Tr. 64-65).

6. She told the plaintiff that Kincaid was selected before the job interviews, even though she had been told this by no one on the committee or otherwise (Tr. 57-58).

Her sole basis for her alleged belief, and the communication of it to the plaintiff, was "woman's intuition" (Tr. 56).

7. She never testified affirmatively that no male applicants were asked about family reactions to night work (Tr. 48), even though she subsequently told the plaintiff this was the case (F&C 6).

8. She had lost political elections to two of her fellow selection committee members (Tr. 63-64).

In sum, Mrs. Boone was not a credible witness, and yet her testimony is not only credited in the plaintiff's findings and conclusions, it is a lynchpin of plaintiff's entire case. The record, for the reasons here set out, will not support such findings and conclusions.

X. KINCAID'S ALLEGED LIST OF JOB DUTIES

Plaintiff's findings and conclusions indicate that Kincaid, the successful applicant, was given a list of his duties after he was hired (F&C 6, 8). This is to infer that he would not know how to execute his position without guidance. In fact, Kincaid denied knowledge of being given the list, and plaintiff's attorney Wallas indicated that the list, actually, was developed by defendant in response to discovery requests (Tr. 138).

XI. THE ROSTER OF JOB APPLICANTS

Nowhere in plaintiff's findings and conclusions is reference made to the fact that six males, in addition to the plaintiff and Kincaid, applied for the position. Six males

were also rejected for the position in question in this litigation.

CITY OF BESSEMER CITY,
NORTH CAROLINA

By /s/ Philip M. Van Hoy
Philip M. Van Hoy
400 South Tryon Street, Suite 3022
Charlotte, North Carolina 28285
Telephone: (704) 377-5151

By /s/ A. C. Blue, III
By /s/ P. M. Van Hoy
Arthur C. Blue, III
Whitesides, Robinson & Blue
246 West Main Avenue
Gastonia, North Carolina 28053
Telephone: (704) 864-5728

Attorneys for Defendant

December 8, 1982

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1526

James Willie Bethea,

Appellant,

v.

Charlotte Transit System,

Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge. (C/A No. 81-0166)

Submitted: December 19, 1983. Decided: March 22, 1984

Before RUSSELL, PHILLIPS, and SPROUSE, Circuit Judges.

(James Willie Bethea, Appellant Pro Se. Mark A. Michael for the Appellee.)

PER CURIAM:

James Bethea appeals the district court's judgment against him. For the reasons stated below, we reverse the district court and remand the case for proceedings consistent with this opinion.

Bethea filed an action in district court alleging that the Charlotte Transit System violated his rights protected by 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* In his pro se complaint, Bethea alleged that the company unconstitutionally discharged him because of his race. Bethea sought compensatory and punitive damages, back pay, and reinstatement of his seniority status. Both he and the company requested a jury trial.

The district court *sua sponte* dismissed Bethea's Title 755 action because he had not alleged that he had filed a timely charge with the EEOC. In addition, the court denied the parties' request for a jury trial on the grounds that Bethea sought equitable relief which was not triable to a jury.

In *Zipes v. Trans World Airlines,* 455 U.S. 385 (1982), the Supreme Court held that filing a timely charge with the EEOC was not a jurisdictional prerequisite to filing a suit in federal court but was a requirement that was subject to "waiver, estoppel, and equitable tolling." *Id.* at 393. Thus, the district court should not have dismissed Bethea's Title VII action but should have given him an opportunity to present an adequate basis for the court's waiving the timely charge requirement. Accordingly, we remand the case for this purpose.

The district court denied both parties' requests for a jury trial on the grounds that Bethea sought equitable relief which is not triable to a jury. Bethea's § 1981 claim was thus tried to the court and subsequently dismissed for failure to make out a case.

The record reveals that Bethea sought not only equitable relief but legal relief (damages) as well. As a

general rule, a party seeking compensatory and punitive damages pursuant to the Civil Rights Act is entitled to a jury trial "unless the claims for punitive and/or compensatory damages . . . are so baseless as to be treated as a sham." *Lynch v. Pan American World Airways*, 475 F.2d 764, 765 (5th Cir. 1973); *Seymore v. Reader's Digest Association, Inc.*, 493 F. Supp. 257, 267 (S.D.N.Y. 1980). Improper denial of a request for a jury trial can be grounds for reversal. *Moore v. Sun Oil Co. of Pa.*, 636 F.2d 154 (6th Cir. 1980). However, because the record reveals that Bethea failed to present sufficient evidence to establish a § 1981 claim, we find that the district court's failure to grant a jury trial was harmless error.

Accordingly, we affirm the district court's disposition of the § 1981 claim but reverse the Title VII claim and remand for further proceedings. Because the dispositive issues recently have been decided authoritatively, we dispense with oral argument.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

REPLY

BRIEF

Office - Supreme Court, U.S.
FILED
MAY 10 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1623

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PHYLLIS A. ANDERSON,

Petitioner,

v.

CITY OF BESSEMER CITY, etc.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF

J. LEVONNE CHAMBERS
JONATHAN WALLAS
JOHN T. NOCKLEBY
Chambers, Ferguson, Watt,
Wallas, Adkins & Fuller, P.A.
Suite 730
951 S. Independence Boulevard
Charlotte, North Carolina 28202

JACK GREENBERG
O. PETER SHERWOOD
ERIC SCHNAPPER*
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

Counsel for Petitioner

*Counsel of Record

No. 83-1623

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

PHYLLIS A. ANDERSON,

Petitioner,

v.

CITY OF BESSEMER CITY, etc.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

==========

REPLY BRIEF

==========

Although avowedly supporting and urging this Court to uphold the working wife defense established by the court of appeals, respondent now urges that this new

Fourth Circuit rule falls short of an absolute defense. Marriage to a working wife, respondent implies, may be entitled to substantial or even heavy weight in the defense of a sex discrimination case, but it will not necessarily be conclusive in every case. (Response, pp. 15-16). This theoretical distinction is of little practical significance in this case. The only specific exculpatory evidence cited by the Fourth Circuit in the critical portion of its opinion is the fact that the male personnel officials were married to women who had worked outside the home. (See id. at 17). The court of appeals regarded the presence of a working wife defense as of such decisive importance as to outweigh, despite Rule 52, the trial judge's finding of intentional discrimination.

The precise weight to be attached to the existence of this working wife defense will in no way affect the manifest importance of this issue. As noted in the Petition, this defense will be available in virtually every Title VII sex discrimination case in the country, since in each instance one or more personnel officials is likely to married to a woman who works, or worked, outside the home. If, as we urge, such a marital status is legally irrelevant, adherence to the decision below will necessarily inject error into every subsequent lower court opinion in which the working wife defense is asserted. Delay by this Court in striking down the working wife defense will inevitably lead to a whole generation of Title VII sex discrimination cases requiring retrial.

Respondent is unable to identify a

single employment discrimination case since Swint in which the Fourth Circuit has not found clear error in trial court f: tual findings favorable to a plaintiff. Respondent suggests, however, that the Fourth Circuit's extraordinary record in this regard may be explained as "a consistent and justified criticism of [a] particular judge," the Hon. James B. McMillan. (Response, p. 11) But the findings of employment discrimination reversed by the Fourth Circuit are not limited to decisions written by Judge McMillan. The Fourth Circuit has dealt in the same manner with all district court decision regardless of the judge involved.1/

1/ See, e.g., Fink v. Western Electric Co., 708 F.2d 909 (4th Cir. 1983) (Judge Eugene Gordon); Patterson v. Greenwood School District 50, 696 F.2d 293 (4th Cir. 1982) (Judge George Anderson, Jr.); Smallwood v. United Air Lines, 728 F.2d 614 (4th

Respondent repeatedly suggests that the district court opinion in this case involved no issues of credibility. (Response, pp. 6, 7, 17-19). In fact the district court's opinion expressly recites that its finding of discrimination was based on "a review of the key evidence and a resolution of the central issue of credibility ...." (Petition, 7a) (Emphasis added). Similarly, with regard to its conclusion that only petitioner was asked if her spouse approved of her working, the trial judge stated:

> After hearing live testimony and considering the credibility of the different witnesses, this court concludes as a fact that no serious question about night work or reaction of spouses was asked of any candidate besides the plaintiff (Response, p. 13a) (Emphasis added).

1/ continued

Cir. 1984) (Judge Albert Bryan, Jr.); Johnson v. Mayor and City Council of Baltimore, 34 E.P.D. ¶ 34,298 (4th Cir. 1984)(Judge Alexander Harvey, II).

Neither of these passages appeared in the Proposed Findings drafted by counsel for petitioner. (See Response, pp. 4a-28a).[2/] Respondent suggests in the alternative that the district judge included these credibility findings in a deliberate "attempt to 'appeal proof' its final opinion." (Response, p. 18). Neither the Fourth Circuit, nor the respondent in its briefs in that court, ever questioned the motives of the district judge in framing this aspect of his opinion. Although the courts of appeals are, as we noted in our Petition, widely divided regarding whether credibility determinations can be reviewed on

---

2/ Indeed, a comparison of the findings proposed by plaintiff's counsel and those filed by the district court several months later indicates that the district court prepared its own opinion in its own words, rewriting every paragraph, adding exhibit and transcript references, and making findings and citing authorities not offered by either party.

appeal, no circuit has ever purported to disregard such findings on the ground that they were the result of a bad faith attempt by a district judge to insulate his decision from review.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

J. LEVONNE CHAMBERS
JONATHAN WALLAS
JOHN T. NOCKLEBY
Chambers, Ferguson, Watt,
Wallas, Adkins & Fuller, P.A.
Suite 730
951 S. Independence Boulevard
Charlotte, North Carolina
28202
(704) 375-8461

JACK GREENBERG
O. PETER SHERWOOD
ERIC SCHNAPPER*
16th Floor
99 Hudson Street
New York, New York 10013
(2120 219-1900

Counsel for Petitioner

*Counsel of Record

PETITIONER'S

BRIEF

Office - Supreme Court, U.S.
FILED
AUG 16 1984
ALEXANDER L. STEVAS.
CLERK

No. 83-1623

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PHYLLIS A. ANDERSON,

Petitioner,

v.

CITY OF BESSEMER CITY, etc.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

JONATHAN WALLAS
JOHN T. NOCKLEBY
Chambers, Ferguson, Watt,
Wallas & Adkins, P.A.
Suite 730
951 S. Independence Boulevard
Charlotte, North Carolina 28202
(704) 375-8461

J. LEVONNE CHAMBERS
O. PETER SHERWOOD
ERIC SCHNAPPER*
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

Counsel for Petitioner

*Counsel of Record

BEST AVAILABLE COPY

QUESTIONS PRESENTED *

1. Did the court of appeals exceed its authority under Rule 52, F.R.C.P., in holding that there was insufficient evidence to support the trial court's finding of hiring discrimination on the basis of sex?

2. Does Rule 52(a), F.R.C.P., forbid the courts of appeals from reviewing the credibility findings of a trial judge?

3. Did the court of appeals err in holding that a prima facie case of employment discrimination on the basis of sex may be rebutted by proof that the responsible personnel officials permitted their wives to work?

---

* The parties to this case are set forth at p. iii of the Petition.

Page

TABLE OF CONTENTS

Questions Presented i

Table of Authorities iv

Opinions Below 1

Jurisdiction 2

Statute and Rule Involved 3

Statement of the Case 4

Statement of the Facts 7

Summary of Argument 12

Argument 19

I. The Trial Court's Finding of Intentional Discrimination Was Not Clearly Erroneous 19

A. The Evidence of Discrimination 24

B. The Decision of the Court of Appeals 47

II. The Trial Court Credibility Determinations are Subject To Only Limited Appellate Review 58

Page

III. The Fact That Defendant Official Is Married to a Working Wife Is Of No Probative Value in a Sex Discrimination Case 76

Conclusion 85

Page

TABLE OF AUTHORITIES

Cases

Adamson v. Galliland, 242 U.S. 350 (1917) 58

Anderson v. City of Bessemer City, 551 F. Supp. 412 (D.C.S.C. 1983) 2

Anderson v. City of Bessemer City, 717 F.2d 149 (4th Cir. 1983) ... 1

Bose Corporation v. Consumers Union, ___ U.S. ___, 80 L.Ed.2d 502 (1984) 16,58

Castaneda v. Partida, 430 U.S. 482 (1977) 66,81,82

Chisholm v. Georgia, 665 F.2d 482 (4th Cir. 1982) 27

Coble v. Hot Springs School District No. 6, 682 F.2d 721 (8th Cir. 1982) 43,44

Dayton Board of Education v. Brinkman, 433 U.S. 526 (1979) .. 23

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 57,69

Inwood Laboratories v. Ives Laboratories, 456 U.S. 844 (1982) 59

Page

King v. Trans World Airlines, 35 FEP Cas. 102 (8th Cir. 1984) 35

Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978) 18,81

Maxwell v. Bishop, 398 U.S. 262 (1970) 67

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 20

McKenney v. Marsh, 31 FEP Cas. 178 (D.D.C. 1983) 39

Miller v. Mercy Hospital, No. 83-1629, petition for certiorari .. 60

Paxton v. Union National Bank, 668 F.2d 552 (8th Cir. 1982) 41

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 12,23,24

Rogers v. Lodge, 458 U.S. 613 (1982) 23

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 20, 21,25,26, 28,47,48

United States v. Oregon State Medical Society, 343 U.S. 326 (1952) 59,60

United States v. Raddatz, 447 U.S. 667 (1980) 61

	Page
United States v. United States Gypsum Co., 333 U.S. 364 (1948)	58-59,63
U.S. Postal Service v. Aikens, 460 U.S. ___, 75 L.Ed.2d 403 (1983)	23,31,53
Weiner v. City of Oakland, 14 FEP Cas. 380 (E.D. Mich. 1976)	35
Witherspoon v. Illinois, 391 U.S. 510 (1968)	67
Statutes	
28 U.S.C. § 1254(1)	3,5
Section 703, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)	Passim
Rule	
Rule 52(a), Federal Rules of Civil Procedure	4,16,24,57,63
Other Authorities	
S. Casteras, *The Substance or the Shadow -- Images of Victorian Womanhood* (1982)	80
E. Flexner, *Century of Struggle* (1959)	81

	Page
New York Times, August 3, 1984, p. A10, cols. 3-4	36
Perpetuation of Past Discrimination, 96 Harv. L. Rev. 828 (1983)	27
Statistical Abstract of the United States, 1982-83	79

No. 83-1623

In the

Supreme Court of the United States

October Term, 1984

Phyllis A. Anderson,

Petitioner,

v.

City of Bessemer City, etc.

==========

BRIEF FOR PETITIONER

==========

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

==========

OPINIONS BELOW

The decision of the court of appeals is reported at 717 F.2d 149, and is set out at pp. 35a-65a of the Appendix to the Petition. The order denying rehearing, which is not reported, is set out at

Petition Appendix p. 66a. The district court's Memorandum of Decision of September 16, 1982, which is not reported, is set out at pp. 1a-5a of the Appendix to the Petition. The district court's Findings of Fact and Conclusions of Law, which are reported at 557 F. Supp. 412, are set out at Petition Appendix pp. 6a-32a.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1983. A timely petition for rehearing was filed, which was denied on November 4, 1983. On January 25, 1984, the Chief Justice granted an order extending the date on which the Petition for Writ of Certiorari was due until April 2, 1984. The Petition was filed on March 30, 1984, and certi-

orari was granted on June 18, 1984. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

Section 703(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a) provides:

> It shall be an unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, sex, or national origin.

Rule 52(a), Federal Rules of Civil Procedure, provides in pertinent part:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

STATEMENT OF THE CASE

On May 18, 1981, petitioner commenced this action in the United States District Court for the Western District of North Carolina. Her complaint alleged that the defendant City of Bessemer City had refused to hire her as the city Recreation Director because of her sex, in violation

of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et. seq. Petitioner had previously filed a charge of discrimination with the Equal Employment Opportunity Commission, which had issued a Determination finding reasonable cause to believe that the defendant had engaged in discrimination on the basis of sex.

The case was heard at a non-jury trial in September 1982. On September 16, 1982, the district judge issued a Memorandum of Decision which concluded that petitioner had been denied the position of Recreation Director because of discrimination on the basis of sex. (Pet. App. 1a-5a). The judge directed that the parties attempt to reach a settlement in light of that decision; if they were unable to do so, counsel for plaintiffs were directed to propose more detailed findings as well as an appropriate

judgment. (Pet. App. 5a). The trial court expressly provided that counsel for the defendant could respond to and comment on whatever was proposed by plaintiff. (J.A. 35a). Counsel for plaintiff submitted proposed findings of fact and conclusions of law on November 15, 1982, and the defendant submitted a detailed response on December 10, 1982. (J.A. 11a-33a, 36a-47a). The trial court issued its Findings of Fact and Conclusions of Law on February 16, 1983. (Pet. App. 6a-32a).

On appeal the Fourth Circuit reversed as "clearly erroneous" each of the controverted factual findings of the district court. (Pet. App. 47a, 51a, 55a-56a, 59a). The court of appeals held that the evidence of discrimination had been rebutted by proof that the male committee members were married to women who had held jobs outside the home (Pet. App. 61a). A

timely petition for rehearing and suggestion for rehearing en banc was denied on November 4, 1983.

STATEMENT OF THE FACTS

Certain basic facts regarding the events giving rise to this litigation are not in dispute. Prior to 1975 most, if not all, recreation activities in Bessemer City were conducted on its behalf by the Optimist Club.[1] The Club then ran "the team sports activities in Bessemer City" (J.A. 142a) and "just about ran the Recreation Department for the City". (J.A. 156a). The Optimist Club is an all-male organization. (J.A. 149a).

---

[1] J.A. 139a, 142a, 156a, 158a, 159a-60a; see note 12 infra.

In 1975 the city decided to appoint a Recreation Director to expand the recreation activities then offered.[2] The mayor named a selection committee composed of one woman, Leona Boone, and four men, Josiah Butler, William McClellan, Frank Nichols and Timothy Helms. Butler and Nichols were members of the all-male Optimist Club, and at differing times had been responsible for the recreation activities it operated on behalf of the city. (J.A. 139a, 156a). Butler personally solicited applications for the position from four men, at least two of whom he knew because of their work in the Optimist Club programs. (J.A. 140a, 141a, 149a). Among those so solicited from the Optimist Club by Butler was Donald

[2] J.A. 108a, 142a, 163a-64a. This was apparently the second such appointment. An unidentified man had earlier been named to this position for a year and then had been dismissed for inaction. (J.A. 145a).

Kincaid, the individual eventually hired as Recreation Director. Butler admitted that he had recruited no female applicants, although he acknowledged knowing two women whom he "would have recommended very highly for the job." (J.A. 144a). The committee also placed an advertisement for the position in the local newspaper. Petitioner was the only woman who applied for the job.

The hiring committee did not establish prior to its selection decisions any standards or guidelines, written or otherwise, for choosing the Recreation Director, other than that the Director would have to live within the City of Bessemer. (Pet. App. 3a, 11a, 20a). Eight individuals applied for the position, and all eight were interviewed by the committee on the same day. The committee concluded that only three of the appli-

cants were qualified for the position --petitioner, Donald Kincaid, and Burt Broadway. The committee unanimously initially preferred Broadway, but decided not to offer him the position when he declined to move to Bessemer City. A majority of the committee then voted to offer the job to Kincaid, who accepted the position. The chair of the committee, Leona Boone, voted in favor of hiring petitioner.

The trial presented conflicting evidence on three important subsidiary issues: (1) whether petitioner alone was asked personal questions indicating a bias against female applicants, (2) whether the committee had manipulated its selection standard, first emphasizing experience over education, and then doing precisely the opposite, in order to assure the

selection of a man, and (3) whether petitioner was better qualified than Kincaid.

The trial judge resolved each of these factual issues in favor of petitioner. Both the September 16, 1982 Memorandum of Decision[3] and the lengthier Findings of Fact and Conclusions of Law[4] of February 16, 1983, addressed each of these disputed issues. The trial court concluded that petitioner was the victim of intentional discrimination and that but for that discrimination she would have been hired as Recreation Director. The court awarded petitioner back pay with interest

---

3 Pet. App. 3a (manipulation of standards), 4a (personal questions; petitioner better qualified).

4 Pet. App. 12a (questions), 15a-20a (petitioner better qualified), 22a (standards).

and a reasonable attorneys' fee. (Pet. App. 33a-34a). The amount of these awards is not in dispute.

SUMMARY OF ARGUMENT

I

The district court found that petitioner had been denied the position of Recreation Director because of her sex, that the reasons given by city officials for rejecting petitioner's application were pretextual, and that but for that purposeful discrimination petitioner would have been appointed to that position. Such factual findings must be sustained on appeal unless clearly erroneous. Pullman-Standard v. Swint, 456 U.S. 273 (1982).

The trial court's finding of intentional discrimination was amply supported by the record and subsidiary findings in this case.

(1) One member of the selection committee, asked at trial why he had chosen to hire a male applicant rather than petitioner, responded, "[A] lady could have run the job. I'm not saying she couldn't, but it would have been real hard." (J.A. 158a). That committee member added that he would not want his wife to have the job, explaining "I think my wife should be at home at night." (J.A. 161a).

(2) At her interview petitioner was asked how her husband felt about her applying for the job. None of the male applicants were asked if their wives approved of their working. The trial court concluded that the question asked of

petitioner "suggested that a woman ought to be at home instead of working." (Pet. App. 4a).

(3) Committee member Butler testified that he knew two women who in his judgment were better qualified for appointment as Recreation Director than Donald Kincaid, the man actually selected. (J.A. 144a). Yet Butler acknowledged that he had solicited applications from Kincaid and three other men, but not from either of the two women. (Pet. App. 10a-11a).

(4) The trial court concluded that the defendant had manipulated its selection standards to assure the selection of a man. (Pet. App. 22a). The reason articulated at trial for hiring Kincaid rather than petitioner was that Kincaid's college degree was in physical education, while petitioner's degree was in elementary education. But the committee's

actual first choice was another man, Burt Broadway, who, like petitioner, lacked a degree in physical education. Petitioner, like Kincaid, had taken physical education courses in college; the selection committee, despite its ostensible emphasis on education, never bothered to inquire what courses either candidate had actually taken. The trial judge properly gave particularly close scrutiny to the explanation offered at trial for hiring Kincaid, since no selection standards or job requirements were established in advance of the decision to reject petitioner's application. Not until after the selection committee knew that Kincaid but not petitioner had a degree in physical education was any preference for such a degree expressed.

II

Rule 52(a) on its face distinguishes between appellate review of credibility determinations and appellate review of other factual findings. Bose Corporation v. Consumers Union, ___ U.S. ___, 80 L.Ed.2d 502, 516 (1984). A trial court's characterization of the demeanor of a witness is unreviewable on appeal. Insofar as a credibility determination turns on evidence other than demeanor, such as the substance of a witness's testimony, however, that determination is subject to review under the usual clearly erroneous standard.

In this case one critical subsidiary issue was expressly and necessarily resolved based on demeanor and credibility. There was conflicting testimony as to whether Kincaid had been asked during his interview whether he was willing to

work at night. Counsel for respondent correctly argued that that issue had to be resolved on the basis of credibility (J.A. 176a), and the trial judge relied on the credibility of the witnesses in concluding that Kincaid was not asked such a question. (Pet. App. 13a). This issue was important because petitioner was asked if she "realized" the job involved night work, an inquiry which the trial judge found "implied substantial doubt that a woman ought to have a job which required night work." (Pet. App. 4a, 12a).

III

The court of appeals held that the direct evidence of discrimination described above had been rebutted by testimony by the four male committee members "that their wives had worked." (Pet. App. 61a). Respondent had deliberately

introduced evidence of the employment histories of the four wives on the theory that it proved that their husbands were not prejudiced against employing women. (J.A. 146a)

This working wife defense necessarily, if tacitly, assumes that the wives of the male committee members would not or could not have worked outside their homes unless their husbands approved. Title VII condemns precisely such "myths and purely habitual assumptions about ... wom[e]n ... ." Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702, 707 (1978). A personnel official's marriage to a working wife should be accorded no weight whatsoever in assessing that official's motives in a Title VII sex discrimination case.

ARGUMENT

I. THE TRIAL COURT'S FINDING OF INTENTIONAL DISCRIMINATION WAS NOT CLEARLY ERRONEOUS

In a Title VII discriminatory treatment action the initial burden on the plaintiff is to establish a prima facie case by demonstrating that she applied for an available position for which she was qualified but was rejected. The burden then shifts to the defendant to rebut the presumption of discrimination by producing admissible evidence that the plaintiff was rejected, or someone else preferred, for a legitimate, nondiscriminatory reason. If the defendant carries this burden, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. The plaintiff must then demonstrate that the proferred explanation was not the true

reason for the employment decision. She may do so either directly by persuading the court that a discriminatory reason more likely motivated the employer, or indirectly by showing that the employer's proferred explanation was unworthy of credence. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253-56 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973).

In the instant case the respondent acknowledged that the petitioner was qualified for the position of Recreation Director, and both courts below agreed that she had met her burden of establishing a prima facie case.[5] The district

[5] Pet. App. 25a, 49a. The respondent apparently acknowledged in the court of appeals that petitioner had done so. Brief for Appellant, p. 13. ("In reference to the McDonnell-Douglas order and allocation of proof, the instant Argument relates to the third stage, that is, whether or not the plaintiff established that the defendant's articulated reasons for the selection of Donald Kincaid are in fact pre-

court assumed that the defendant had, as required by Burdine, articulated a nondiscriminatory reason for hiring Kincaid instead of petitioner: the fact that Kincaid's college degree was in physical education. The district court, relying on the method of analysis mandated by Burdine, then considered whether petitioner had nonetheless met her burden of persuasion that she had been rejected because of her sex. The trial court expressly concluded that petitioner "was not selected for the position of recreation director because of her sex".[6] The district judge further held that the

textual...")

[6] Pet. App. 20a; see also id. at 2a (petitioner "was denied the job because of her sex"), 7a (petitioner "was denied the job because of her sex"), 23a ("[t]he male members of the committee chose Kincaid ... because he was male"), 31a ("plaintiff has been discriminated against because of her sex in violation of Title VII....").

reason given for selecting Kincaid, his possession of a degree in physical education, was "pretextual",[7] and that "[b]ut for the discrimination based on sex, the plaintiff would have been selected for the position of Recreation Director of Bessemer City."[8]

At the trial of this action, as in most civil litigation, the different documents and live testimony adduced by the parties pointed toward different conclusions. The conflicting evidence in this case required "the district court [to] decide which party's explanation of

---

[7] Pet. App. 2a, 26a. The trial court also held pretextual Helms' explanation, concurred in by no other member of the Committee, that he had chosen Kincaid because of the program of proposed activities Kincaid described at his interview. (Pet. App. 23a). Both McClellan and Boone testified, and the trial court held, that the program proposed by Kincaid was indistinguishable from the program proposed by petitioner. Id.

[8] Pet. App. 23a; see also id. at 27a.

the employer's motivation it believe[d]". U.S. Postal Service v. Aikens, 460 U.S. 711, ___, 75 L.Ed.2d 403, 411 (1983).[9] The district court's decision here that the respondent had been motivated by a discriminatory purpose may be reversed on appeal only if clearly erroneous. "'Findings as to the design, motive and intent with which men act' [are] peculiarly factual issues for the trier of fact and therefore subject to appellate review under Rule 52." Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982). This Court has repeatedly applied that limited standard of review to claims of discriminatory intent. See, e.g., Rogers v. Lodge, 458 U.S. 613, 622-23 (1982); Dayton Board of Education v. Brinkman, 433 U.S. 526, 534 (1979). An appellate court "may only

---

[9] The Fourth Circuit's opinion contains no reference to Aikens.

reverse a district court's finding on discriminatory intent if it concludes that the finding is clearly erroneous under Rule 52(a)." Pullman-Standard v. Swint, 456 U.S. 273, 290 (1982).

(A) The Evidence of Discrimination

The Fourth Circuit did not suggest that the trial judge's decision was based on any error of law. Rather, the appellate court held that the record in this case was devoid of any evidence which could support the trial judge's finding of discriminatory intent. In fact, however, the evidence adduced at trial not only permitted but compelled the findings made by the district judge. That record included an admission that sex had been a reason for rejecting petitioner's application, proof of selective recruiting on the

basis of sex, and evidence that only petitioner was asked how her husband felt about her applying for the job.[10]

(1) There is at the outset considerable question as to whether the defendant met its burden to "clearly set forth, through the introduction of admissible evidence, ... reasons for the plaintiff's rejection [that are] legally sufficient to justify a judgment for the defendant." Burdine, 450 U.S. at 255. The defendant attempted to prove that Kincaid was preferred because of his degree in physical education, the only reason for his selection articulated by more than a single member of the selection committee. But committee member Nichols, who referred to that degree as part of the reason for

---

[10] See, e.g., J.A. 95a, 108a, 158a, 161a; see also Pet. App. 12a, 13a, 21a, 26a.

Kincaid's selection,[11] also conceded that petitioner's sex was another motivating factor. (See pp. 28-29, infra). Had Nichols been the only personnel official involved, this testimony would clearly have been inadequate to meet the defendant's burden under Burdine. Committee member Butler also stated that his preference for Kincaid was based on two considerations, Kincaid's degree in physical education and Kincaid's participation in the Optimist Club program. (J.A. 141a). Since the Optimist Club was an avowedly discriminatory organization with only male members, and the program in which Kincaid was involved was operated by the Club on behalf of the City,[12] Butler's testimony by itself also failed to

[11] J.A. 157a.

[12] See note 1, supra.

articulate a clearly nondiscriminatory basis for Kincaid's selection.[13] Committee member Helms, when asked why he voted for Kincaid, made no mention of Kincaid's college degree, but insisted that his vote was based on the proposed recreational activities which Kincaid described at his interview. (Pet. App. 23a). The trial court rejected this explanation as pretextual, since several other witnesses

[13] In the district court and court of appeals, counsel for respondent repeatedly referred to the activities conducted by the all-male Optimist Club as a city program. Brief for Appellant, pp. 4 (Butler "as Youth Activities Director of the Bessemer City Optimist Club ... had the entire responsibility for the operation of the City's recreation progam"), 5 (Nichols "in 1975 was the Youth Director of the Bessemer City Optimist Club, which then managed the defendant's recreation program."), 7; J.A. 36a, 37a. Any preference for experience which was previously available only to men would unlawfully perpetuate the effects of past discrimination. See Chisholm v. Georgia, 665 F.2d 482, 485 (4th Cir. 1982); Perpetuation of Past Discrimination; 96 Harv. L. Rev. 828 (1983).

had testified the programs proposed by Kincaid and petitioner were indistinguishable. (Id.). Committee member Boone actually voted to hire petitioner rather than Kincaid. Thus of the five committee members only one, McClellan, testified that Kincaid's physical education degree, untainted by any combination with some discriminatory consideration, was the reason why he preferred to hire Kincaid. Assuming arguendo that these conflicting accounts were sufficient to satisfy respondent's burden under Burdine, it is apparent that they provided relatively little evidentiary support for respondent's explanation of its selection of Kincaid.

(2) The district court emphasized that a member of the hiring committee candidly acknowledged at trial that one of the reasons he opposed hiring petitioner

was her sex.[14] Frank Nichols, when asked by counsel for respondent why he had preferred Kincaid over petitioner, referred to Kincaid's degree in physical education, then added another reason:

> Q. Anything else?
>
> A. At the time that we were talking about getting this recreation program started at Bessemer City, a lady could have run the job. I'm not saying she couldn't, but it would have been real hard. (J.A. 158a).

On cross examination Nichols reiterated his reservations about the wisdom and propriety of hiring a woman:

> Q. You wouldn't want your wife to have that job, though, would you?
>
> A. No, sir, I wouldn't.
>
> Q. And you wouldn't want to put a lady through lining ballfields and being at the gym at night?

---

[14] Pet. App. 20a, 26a.

> A. I'm speaking personally for myself. I have three children at home, and I think my wife should be at home at night. (J.A. 161a).

Although Nichols stopped short of stating that he would never hire a woman for the position, he never withdrew or disavowed his express testimony that he preferred Kincaid over petitioner in part because of petitioner's sex. This direct evidence of discriminatory intent was a frank admission of precisely the sort of sexist purpose alleged by petitioner and forbidden by Title VII. While such direct proof of discriminatory intent is not required to establish a Title VII violation, it is certainly of exceptional importance where

it can be shown.[15] U.S. Postal Service v. Aikens, 460 U.S. at ____, 75 L.Ed.2d at 409 n.3 (1983).

(3) The district court found that during her interview petitioner had been asked if her husband approved of her applying for the job.[16] Petitioner understandably regarded this as an inappropriate inquiry:

> I remember the question was asked how my husband felt about me applying for the job as Recreation Director, and I replied that my husband had nothing to do with my

---

[15] The court of appeals inexplicably dismissed this testimony as "inadequate to support a finding of bias". (Pet. App. 61a n.5). The appellate court gave no explanation of why a candid admission of a discriminatory purpose is insufficient to support a finding of bias, and none can readily be imagined.

[16] Pet. App. 12a, 13a, 21a, 26a; see also id. at 4a, 25a.

applying for the job; however, he was behind me 100 percent.[17]

Committee member Boone confirmed that this question had been asked,[18] and none of the defense witnesses denied that that had occurred.[19] The trial court found that no comparable question had been asked of male

---

[17] J.A. 95a. See also id. at 81a-82a. Petitioner also referred to this question in her written EEOC complaint filed only a few days after the interview. (J.A. 73a).

[18] J.A. 108a.

[19] The court of appeals stated, "The evidence in this case ... amply demonstrated that a substantially similar question concerning ... family reaction was posed both to Anderson and Kincaid, if not to all candidates." (Pet. App., 58a). No witness testified that any such question had been asked of Kincaid or any other male applicant. Although the court of appeals appeared to characterize Boone's comment to Kincaid about his new wife, "and your new bride won't mind," as a "question", see Pet. App. 58a, the appellate court later correctly described Boone's words as a "remark". Id. The difference between a question and a remark is of obvious importance.

applicants,[20] and characterized this inquiry as a "gender stereotyped"[21] question "which suggested that a woman ought to be at home instead of working."[22]

The district court also concluded that petitioner had been asked if she "realized" the position would involve night work and travel.[23] No male applicants were asked about travel. (Pet. App. 12a) There was conflicting testimony as to whether Kincaid or the other men had been asked about night work,[24] but the district court concluded that only petitioner had

---

[20] Pet. App. 12a, 13a, 21a, 26a.

[21] Pet. App. 25a.

[22] Pet. App. 4a.

[23] Pet. App. 12a (night work, travel), 21 (night work), 26a (night work). Petitioner's testimony regarding these questions is set out at J.A. 81a.

[24] See pp. 70-76, infra.

been asked such a question.[25] The district court noted that an inquiry about night work, if made of all applicants, might arguably be job related, but that such an inquiry when asked of female applicants only implied a belief that "women have family responsibilities that should keep them home at night."[26] These questions provided direct evidence of the state of mind of the committee at the time it rejected petitioner's application.

---

[25] Pet. App. 12a, 13a, 21a, 26a. The court of appeals asserted that this "finding is without evidence to support it...." Pet. App. 59a. The testimony of Boone, quoted in the Fourth Circuit's own opinion only a paragraph earlier, was as follows:

> "Q. Did you tell Phyllis Anderson that Donnie Kincaid was not asked about night work?
>
> "A. He wasn't asked about night work."

Pet. App. 57a; see also J.A. 108a, 120a, 121a.

[26] Pet. App. 21a. That was precisely Nichols' view. See pp. 29-30, supra.

Inquiries of female job applicants about their families or marital plans are the hallmark of intentional discrimination on the basis of sex.[27] Such questions to female job applicants about their personal lives remain, despite the passage of Title VII, a common phenomenon in the United States,[28] signaling an assumption on

---

[27] The evidentiary significance of such questions does not depend on a showing that they are utterly unrelated to the job. A question is not exempt from scrutiny because of the mere possibility, however remote, that the information sought could under some unlikely circumstances be job-related. The hallmark of a sexually stereotyped inquiry is that it reflects the types of prejudices which prior to 1964 were the basis of the discrimination against female workers now forbidden by Title VII. Those prejudices include assumptions about the appropriate roles of husbands and wives in marriage, housework, and childrearing, and about the kind of work that a woman is capable of doing.

[28] See, e.g., King v. Trans World Airlines, 35 FEP Cas. 102, 103, 105 (8th Cir. 1984); Coble v. Hot Springs School Dist. No. 6, 682 F.2d 721, 724 (8th Cir. 1982); Weiner v. City of Oakland, 14 FEP Cas. 380, 381 (E.D. Mich. 1976). On August 3, 1984, the New York Times reported the following

the part of the questioner that marriage or housework are for women a more appropriate avocation than employment outside the home. That was, as the trial court noted, precisely the unavoidable implication of the particular questions asked of petitioner. Similar personal inquiries are not made of male applicants because of the universal assumption that men will and should remain employed regardless of their family responsibilities. In this case no witness suggested Kincaid was asked if his

---

colloquy:

> "Sandi Hesser, 29, explained that whenever she applied for a job she was asked whether she was married and when she was going to have children. 'Twenty-four years ago when I went out into the job market I found the same thing', Mrs. Ferraro said. 'Are you geting married? Are you going to havechildren.' The Vice-President nominee told Mrs. Hesser it was important to remember you can do both."

P. A10, cols. 3-4.

spouse objected to his working for a living, and it is simply inconceivable that an interviewer would put such a question to a man.

For working women a sexually stereotyped question of this kind is the moral and practical equivalent of the racially segregated water fountains and lunchrooms which once infested the nation's factories and offices, both a demeaning affront in and of itself and a grim harbinger of discrimination to follow. Such inquiries can announce as clearly as the most blatant direct statement a questioner's discriminatory belief that a woman should not work without her husband's permission, or that women are somehow unsuited for certain types of jobs. A question of this type places a female applicant in an unconscionable dilemma, forcing her to chose between either answering the

inquiry, thus giving legitimacy to an overtly discriminatory question, or articulating an objection to the inquiry, which may unavoidably offend the questioner. If asked a question such as "How does your husband feel about your working for a living?", a female job applicant is compelled either to compromise her principles, and the principles which underly Title VII, or to compromise her chances for employment.

Such inquiries constitute a per se violation of Title VII. Section 703(a) broadly prohibits any act of discrimination on the basis of sex with respect to employment. Any intentional difference in the method in which male and female applicants are interviewed for a job is on its face discriminatory. When an employer utilizes such sexually stereotyped inquiries, it compels even successful female

applicants to run a gauntlet of obnoxious or demeaning questions, a process from which male applicants are exempt. It is often irrelevant whether identical questions were asked of men. In many instances the same inquiry, such as whether the applicant's spouse approves of the applicant working outside the home, is an insult when asked of a woman, but a joke when asked of a man.

(4) The district court held that the defendant had failed "to solicit qualified men and women equally to apply for the position."[29] The court noted that Josiah Butler acknowledged that while he knew of six qualified individuals, four men and two women, he had solicited applications only from the four men.[30] The failure to

---

[29] Pet. App. 25a; see also id. at 26a. Compare McKenney v. Marsh, 31 FEP Cas. 178, 180 (D.D.C. 1983).

[30] Pet. App. 10a-11a, 21a. Butler attempted to explain his conduct by asserting that

solicit the two women involved was quite possibly critical to the outcome of the selection process, since both women had degrees in physical education, the criterion ostensibly relied upon to reject petitioner, and Butler insisted that he would have voted to hire either of them instead of Kincaid.[31] Conversely, although Butler solicited applications from four men, he only testified that one of them had a degree in physical education.[32] Two

---

he doubted the women would have taken the position because it was not well paid. (J.A. 149a). Butler acknowledged he did not actually know whether the two admittedly qualified women were making more or less than the salary being offered for the Recreation Directors. Id. The trial court refused to credit this explanation, noting that Butler had made no similar analysis of the likely salary demands of the four men whom he recruited. (Pet. App. 21). One of the four men Butler recruited, Russ Bergman, was a teacher like the two women whom Butler declined to recruit. (J.A. 148a).

[31] J.A. 144a.

[32] Butler stated that Kincaid had a degree in education. Broadway had no such degree.

of the men Butler recruited were his first and second choices for the job, Burt Broadway and Donald Kincaid, and both Broadway and Kincaid were known to Butler because all three had been involved in the activities of the all-male Optimist Club.[33] This pattern of selective recruiting was clearly of substantial weight in evaluating the motive behind the city's decision to hire Kincaid, and in assessing whether the subsequent emphasis on possession of a degree in physical education was pretextual.

(5) The trial court concluded that the defendant had manipulated its selection standards to assure the selection of a man.[34] (See Pet. App. 51a). Noting the

---

Butler gave no indication that either Pierson or Bergman had such degrees.

[33] J.A. 140a, 141a.

[34] Compare Paxton v. Union National Bank, 688 F.2d 552, 563-68 (8th Cir. 1982)(employer emphasized either education or experience

allegedly decisive importance which the committee attached to a physical education degree in choosing between Kincaid and petitioner, the district court found:

> The emphasis by the male committee members on the importance of a degree in health and physical education was abandoned when they explained why Broadway was their first choice. Broadway had no degree; they found him most qualified because of his work experience. ... Yet the male members of the committee downplayed the significance of experience when comparing plaintiff's teaching, supervisory, and recreation experence to Kincaid's qualifications. (Pet. App. 22a).

The trial judge noted that the committee had made its choice without first formulating a description of either the responsibilities of a Recreation Director or the qualifications which it would seek in an applicant.[35] The district court recognized

---

depending on which criterion led to the selection of a white).

[35] Pet. App. 3a, 11a, 20a, 27a.

that such a standardless selection process "left the committee members free to use their own biases in the selection."[36]

The district court correctly attached considerable significance to the fact that neither the committee nor any of its members articulated any concern with possession of a degree in physical education until after Kincaid had been selected. In a world in which no two applicants are ever identical, it will always be possible to identify after the fact some characteristic unique to an applicant who was actually preferred for an unlawful reason. In a Title VII case in which, as here, the criterion relied on to reject the plaintiff was only articulated <u>after</u> the selection officials knew the criterion would have that effect,

---

[36] Pet. App. 27a. See <u>Coble v. Hot Springs School District No. 6</u>, 682 F.2d 721 (8th Cir. 1982.)

substantially less evidence will ordinarily be necessary to establish that that criterion was merely a pretext.[37]

In this case there was a substantial body of evidence supporting the trial court's conclusion that the emphasis on possession of a physical education degree was a mere pretext. First, as the trial court noted, none of the committee members ever bothered to inquire of Kincaid what courses he had actually taken, or how the courses he had completed in health and physical education might have differed, if at all, from the courses on the same subjects which petitioner had taken.[38] The committee did not ask, could not know, and

---

[37] See, e.g., Coble v. Hot Springs School Dist. No. 6, 682 F.2d 721, 728 (8th Cir. 1982)(selection criterion met only by successful male applicant not announced until after choice made.)

[38] Pet. App. 19a; J.A. 134a, 150a.

apparently did not care whether Kincaid actually had more such courses than petitioner, or whether his courses may have included topics, such as skiing, that might be irrelevant to the Recreation Department. Second, competitive athletics, the apparent subject of Kincaid's education,[39] was only one of five major goals of the Recreation Department. (Pet. App. 4a). A majority of the committee agreed that one of the primary purposes of hiring a Recreation Director was to expand the recreation activities from the sports programs already operated by the Optimist Club to activities such as music, dance, drama, and programs for the handicapped and elderly.[40] Third, whatever educational advantages Kincaid may have had, his work

---

[39] See J.A. 63a.

[40] J.A. 108a, 116a-17a (Boone), 142a (Butler), 164a (Helms).

experience was strikingly less valuable than petitioner's. In March 1975, Kincaid had been out of college less than a year, while petitioner had twenty years of experience in a variety of positions related to the job of Recreation Director. Of the two applicants, for example, petitioner was the only one who had actually done budgeting or bookkeeping, supervised other employees, or taught dance, music, or art.[41] Only petitioner had actually organized and officiated at recreational activities as part of her employment,[42] and as of March 1975 only she had received a North Carolina State Recreational Director's Certificate, which is awarded based on such experience.[43] The

[41] J.A. 86a (dance), 86a-87a (bookkeeping), 87a (music, art, fundraising), 90a (fundraising).

[42] J.A. 86a, 88a-89a, 100a, 103a.

[43] J.A. 91a, 100a-101a.

decision of the city to hire Kincaid was avowedly based on his possession of a degree in physical education; the district court concluded that if all relevant experience and training were considered, petitioner was the better qualified applicant.[44] That finding supported the trial court's conclusion that the defendant's after the fact emphasis on possession of a degree in physical education was pretextual. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981).

(B) The Decision of the Court of Appeals

In dismissing the record in this case as insufficient to support any finding of discrimination, the court of appeals insisted that a plaintiff in a Title VII

[44] Pet. App. 4a, 15a-19a.

case is required to prove that he or she is "better qualified" than the person actually hired or promoted. (Pet. App. 50a)(Emphasis in original). This Court expressly rejected that rule in Texas Dept. of Community Affairs v. Burdine, holding that an employer is not free to discriminate on an otherwise impermissible basis among equally qualified individuals. "[T]he employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria."[45] 450 U.S. at 259 (Emphasis added). A requirement that a Title VII plaintiff prove that he or she was better qualified than the applicant or employee chosen for a position would

[45] The court of appeal's opinion recognizes no such limitation on an employer's decision. "[A]mong equally qualified candidates, an employer has discretion to choose the person he prefers." (Pet. App. 54a-55a).

effectively repeal Title VII for the substantial number of positions in the United States labor market for which all of the qualified applicants are essentially equally qualified.

The Fourth Circuit's analysis of the evidence in this case is inexplicably replete with inaccurate descriptions of the record. The court of appeals asserted "even Boone specifically denied that Anderson was better qualified." (Pet. App. 54a). In fact Boone's testimony contained several such assertions, one of which was deliberately edited out of the quotation reproduced in the Fourth Circuit's opinion, specifically stating that Anderson was better qualified.[46] The

[46] The relevant portion of the Boone testimony quoted by the court of appeals is set out below. The underlined portions were replaced by an elipsis in the appellate opinion:

"Q. How about art, do you believe either one of them had qualifi-

court of appeals asserted Kincaid had "the most directly relevant work experience." (J.A. 52a). In fact, the only jobs Kincaid had ever held since graduating from college were selling life insurance and working for a finance company, neither of which involved any recreational activities. The court of appeals asserted that petitioner had not supervised any

---

cations superior to the other?

"A. That wasn't the basis of the hiring of a recreation -- you asked me what I felt like would be....

"Q. What you were looking for in qualifications as a member of the committee....

"A. As an all around Director, I felt like Phyllis was the better applicant.

"Q. As to the subject of art, specifically?

"A. No."

J.A. 117a; see also id. at 109a.

47 J.A. 135a.

recreational activities since 1957 (J.A. 52a). In fact, as the district court noted, petitioner had throughout the decade prior to 1975 taught physical education as part of her work as a public school teacher.[48] The court of appeals asserted that petitioner's "budgetary experience was limited to collecting money for school lunches and trips". (Pet. App. 53a). In fact, as the district court found, petitioner had extensive experience raising, budgeting and accounting for funds, both as an official of several civic and charitable organizations, and as a bookkeeper for several physicians.[49] The court of appeals asserted that petitioner's college degree in education was "unrelated" to the work of a Recreation

---

48 Pet. App. 16a; J.A. 87a, 88a-89a, 100a, 103a.

49 Pet. App. 17a-18a; J.A. 86a-87a, 90a.

Director. (Pet. App. 52a). In fact, as the district court found, petitioner had been required, in order to obtain her degree, to take courses in physical education,[50] the type of courses which the appellate court thought of decisive relevance when taken by Kincaid. These errors are typical of the problems likely to arise when an appellate court seeks to substitute its own findings of fact for those of the trial judge who actually heard the case and who will often be considerably more familiar with the details of the record.[51]

In reversing the trial judge's finding of discrimination, the court of appeals emphasized that petitioner's

---

50 Pet. App. 17a; J.A. 90a-91a.

51 Such de novo reconsideration of trial court findings of intentional discrimination appear to be the normal practice in the Fourth Circuit. See Petition for Writ of Certiorari, pp. 13-17.

education was not "current,"[52] and that her work experience in recreation was "too remote in time to merit serious consideration."[53] But this simply was not the reason articulated by the committee officials for hiring Kincaid rather than petitioner. The responsibility of a defendant under Burdine is to adduce admissible evidence that the plaintiff was denied the dispute for one or more specific reasons. 450 U.S. at 255. It is the explanation set forth by such evidence, and that explanation alone, which a plaintiff is required to prove is pretextual. The attorneys for the defendant may

---

52 Pet. App. 52a. In fact petitioner received her college degree in elementary education, a degree which required courses in physical education, in 1973, only two years before she applied for the position of Recreation Director. (J.A. 90a).

53 Pet. App. 54a. In fact petitioner was actually teaching physical education to elementary school students as recently as 1973. J.A. 87a-90a.

not alter or supplement that explanation in briefs or arguments, 450 U.S. at 255 n.9; a fortiorari an appellate court is not free to "articulate" explanations for the defendant's conduct which were never articulated by the defendant itself.

In sum, the evidence and subsidiary findings in this case represent far more than the minimal proof necessary to support the district court's ultimate finding of discrimination. The pattern revealed by the record in the case is a paradigm of the variety of obstacles that continue to deny women equal opportunity in employment. The position for which petitioner applied was one of many in American society which has traditionally been reserved for men. An avowedly discriminatory all-male club played a pivotal role in the selection of the successful male candidate. Because of his

participation in the Optimist Club, Kincaid was recruited for the job, was already known to two of the four committee members who voted for him, and was credited with relevant practical experience. All of those critical advantages associated with involvement in the Optimist Club were closed to petitioner because of her sex. When petitioner interviewed for the position, she was subjected to a demeaning inquiry about whether her spouse approved of her applying for the job, an inquiry that was not and could not conceivably have been made of a male candidate. At trial one of the committee members candidly acknowledged that he had voted to hire Kincaid rather than petitioner in part because petitioner was a woman.

If a finding of intentional discrimination cannot be sustained on the basis of such a record, establishing a claim of disparate treatment would be virtually impossible. Most of the Title VII cases in which the lower courts have found discriminatory intent involve less evidence than was adduced here, and few, if any, present the extraordinary variety of proof adduced by petitioner. Indeed, if future plaintiffs were required to assemble a record comparable to the unique circumstances involved in this case, Title VII might well be a dead letter. In affirming the decision of the district court, this Court should reiterate its past holdings that the various types of direct evidence of discrimination present in the instant case are not required.

International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977).

II. TRIAL COURT CREDIBILITY DETERMINATIONS ARE SUBJECT TO ONLY LIMITED APPELLATE REVIEW

All of the trial court's findings should be sustained as not clearly erroneous. Moreover, certain of those findings, the trial court's express demeanor-based credibility determinations, are not subject to appellate review at all. Rule 52(a) admonishes the appellate courts that in reviewing trial court findings of fact "due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses... ." Rule 52(a) also provides more generally that all findings of fact, regardless of whether or not based on credibility issues, are not to be over-

turned unless "clearly erroneous." The rule's requirement of "due regard" for credibility determinations must, unless entirely redundant, contemplate a different standard of review for credibility findings than would be applicable to other types of factual findings. Cf. Bose Corpooration v. Consumers Union, ___ U.S. ___, 80 L.Ed.2d 502, 516 (1984).

The decisions of this Court, while indicating that credibility determinations have a special status on appeal, have not heretofore resolved the standard of review. Adamson v. Galliland, 242 U.S. 350 (1917), suggested that trial court credibility assessments might be "unassailable", 242 U.S. at 353, but United States v. United States Gypsum Co., 333 U.S. 364 (1948) cautioned that such findings were

not necessarily "conclusive." 333 U.S. at 395. United States v. Oregon State Medical Society, 343 U.S. 326 (1952), emphasized:

> Face to face with living witnesses the original trier of fact holds a position of advantage from which appellate judges are excluded. In doubtful cases exercise of his power of observation often proves the most accurate method of ascertaining the truth... How can we say the judge is wrong? We never saw the witnesses....

343 U.S. at 339.

But that decision did not undertake to define the "doubtful cases" in which appellate review would be inappropriate. More recently this Court cautioned that "[d]etermining... credibility... is the special province of the trier of fact." Inwood Laboratories v. Ives Laboratories, 456 U.S. 844, 856 (1982). Inwood Laboratories did not explain, however, when, if ever, that special province was also the exclusive province of the trier of fact.

The courts of appeals have for several decades been sharply divided regarding the appropriate standard of review for trial court credibility determinations.[54]

Whether a trial court's credibility determination is subject to review under the ordinary "clearly erroneous" standard, or entirely immune from appellate scrutiny, depends, we urge, on the type of evidence relevant to that determination. There are, as this Court recognized in Oregon State Medical Society, facts relevant to the credibility of a witness of which only the trial court has direct knowledge. Only the trial judge can observe the demeanor of a witness, hear the phrasing and intonation which may shed important light on the words being spoken, or note the forcefulness or hesitation in

[54] See Petition for Writ of Certiorari, Miller v. Mercy Hospital, No. 83-1629.

the witness's voice. See United States v. Raddatz, 447 U.S. 667, 679 (1980). This information can be important, not only to assessing the veracity of testimony, but also in deciding what it means. The same words can have very different meanings depending on the manner in which they are spoken or the gestures by which they are accompanied.

Insofar as a trial court's decision purports to describe such events, events necessarily absent from the cold record, that description must ordinarily be regarded as unassailable on appeal. That immunity from appellate scrutiny stems, not from any special legal status of credibility issues, but from the fact that the appellate court simply has no other source of information about the demeanor of a witness. The same principle would be applicable if a trial judge, following a

visit to a site involved in a case, provided in his or her opinion a description of a building, piece of machinery or odor that was not described by any witness. His role in such a situation is analogous to the role of the court reporter in providing the reviewing court with a description of what words were spoken at trial.

While a trial court's characterization of a demeanor of a witness must ordinarily be accepted by the appellate courts, that demeanor is frequently not the only evidence bearing on the credibility of a witness. The substance of what a witness says is as important as how he or she says it; a witness who states in the most grave and convincing manner that it snowed in Miami on July 4 is clearly not to be believed. Similarly, extrinsic documentary or other physical evidence may

be available which bears directly on the truthfulness of disputed testimony. Thus in United States v. United States Gypsum this Court concluded that the trial court's description of the credible demeanor of certain witnesses was overcome by documents which demonstrated that those witnesses were lying. 333 U.S. at 396-99. If a trial court's assessment of the demeanor of a witness is the only factor bearing on the credibility of a witness, the trial court's credibility decision, like the assessment of demeanor on which it depends, must be accepted on appeal. But where other evidence exists bearing on the veracity of a witness' statement, the Rule 52 clearly erroneous standard should be applied in determining whether all the relevant evidence, including the demeanor of the witness as reported by the trial

judge, adequately supports the ultimate credibility finding made by the trial court.

The conclusive nature of a trial court's determination of the demeanor of a witness compels a commensurate degree of caution in ascertaining what a trial court has in fact decided. The meaning of an opinion specifically referring to demeanor will ordinarily be clear. Similarly, an express reference by a trial judge to the credibility of a witness can ordinarily be understood at least in part as a reference to the demeanor of that witness. In a particular case, of course, the nature of the facts in controversy and of the other relevant evidence may throw additional light on the meaning of a trial court's findings.

Where a trial court merely chooses to rely on or ignore the testimony of a particular witness, however, without making any express finding regarding credibility or demeanor, the appellate courts are not free to simply assume that findings regarding the demeanor or credibility were made. A trial judge may choose to accept the testimony of a particular witness, not because the judge found the witness totally credible, but merely because the judge did not regard the conflicting evidence as relevant, admissible, or legally sufficient, or even because the judge failed to recognize that such a conflict existed. Testimony may also be ignored by a trial judge for reasons unrelated to credibility. Thus, while the appellate courts are not free to speculate about the appearance and demeanor of a witness whom they never saw,

those courts are equally precluded from deferring to unspoken credibility determinations whose actual existence is itself no more than a matter of conjecture.

The non-reviewability of credibility determinations has a second, equally important, limitation. The credibility of a witness, even if solemnly attested to by a federal judge, cannot overcome any legal insufficiency in the substance of the witness' remarks. For example, this Court has repeatedly held that evidence of intentional exclusion of black citizens from a grand or petit jury cannot be rebutted by a generalized denial by the jury commissioners of any discriminatory motive. Castaneda v. Partida, 430 U.S. 482, 498 n.19 (1977). A credible generalized denial of discrimination would be equally insufficient. Similarly, this Court has held that a juror may not

constitutionally be excused for cause in a capital case based on a question regarding whether his or her scruples "might" prevent him or her from voting for the death penalty. Maxwell v. Bishop, 398 U.S. 262, 265 (1970). A voir dire couched in such ambiguous language is inadequate as a matter of law under Witherspoon v. Illinois, 391 U.S. 510 (1968), and no credibility assessment can transmogrify an unconstitutionally uncertain answer into a response with the requisite unmistakable clarity. Credibility assessments often play an important role in the resolution of litigation, but they can only carry so much weight. Such assessments, no matter how sincere, cannot serve as a substitute for questions that were never asked, answers that were never spoken, or instructions that were never given.

The restrictions on appellate review of trial court credibility determinations have an important but limited application to the instant case. We do not contend that the district court's finding of intentional discrimination is itself immune from appellate review. The finding of discriminatory purpose does concern the motives of Butler, McClellan, Nichols and Helms, all of whom testified before the trial judge in this case. That ultimate finding is nonetheless subject to review under the clearly erroneous standard for several reasons. First, here, as in virtually all other Title VII actions, there was a substantial body of evidence bearing on the motives of the defendant officials other than the credibility vel non of their testimony. The amount and importance of such evidence is ordinarily so substantial that both this Court and

the lower courts generally attach little importance to the credibility of exculpatory testimony. See, e.g., Teamsters v. United States, 431 U.S. 324 (1977). Even if the trial court here had expressly held that the demeanor of the defense witnesses indicated that they were lying about their reasons for hiring Kincaid, an appellate court would still be obligated to apply the ordinary Rule 52 standard to the record as a whole. Second, in this case there simply is no generalized finding regarding the credibility of Butler's, Helms', Nichols' and McClennan's denials of discriminatory intent. Rather, it is clear that the trial court's finding of discriminatory purpose was based on a review of the entire record adduced at trial.

There is, however, one important subsidiary issue which was expressly and properly resolved on the basis of credibility, and which, for that reason, is not subject to review on appeal. Petitioner claimed that she was asked a series of questions that were not asked of any of the male applicants. Both petitioner and committee member Boone testified that petitioner was asked how her husband felt about her applying for the job, if she realized there would be night work involved, and if she realized the job would require her to travel throughout the county.[55] Boone further testified that such questions were not asked of Kincaid or any of the other male applicants.[56] Respondent's witnesses did not deny that

[55] Pet. App. 4a, 12a; J.A. 63a, 81a, 95a, 97a.

[56] J.A. 48a, 65a.

these questions had been asked of petitioner; respondent sought, rather, to establish that similar questions had been asked of male applicants. Respondent adduced evidence which to some extent conflicted with Boone's testimony on this issue.[57] As the trial judge noted, however, part of Boone's testimony was in fact uncontradicted; no defense witness testified that any male applicant was asked how his wife felt about applying for the job, or if he "realized" he would have to travel.

The actual conflict in the testimony was limited to the question of night work. Kincaid was asked twice if the committee had questioned him about his willingness to work at night, but twice declined to assert such questions had been asked, testifying only that at the interview he

[57] Pet. App. 12a.

had mentioned having worked long hours at a prior job.[58] Butler testified he could not remember Kincaid being asked if he were willing to work nights, but recalled that Kincaid was asked "in a way" how his family would react to night work.[59] Defense witness Nichols gave the opposite testimony; he could not recall questions being asked about family reactions to night work, but stated that male applicants were questioned about their willingness to work long hours and evenings.[60] Boone testified she had "made the comment to [Kincaid] personally -- and your new bride won't mind", but insisted she had not asked Kincaid a question on the subject.[61] Asked

---

58 J.A. 129a.

59 J.A. 145a.

60 J.A. 157a-158a.

61 J.A. 121a.

by counsel for respondent who had put to Kincaid "the question about his wife's reaction", Butler insisted on characterizing what Boone had said as a "reference" rather than a question.[62] In his closing argument counsel for respondent advised the trial judge that these conflicts presented "a matter for resolution of credibility on your part."[63]

Faced with this conflicting evidence, the trial judge expressly resolve the issue on the basis of credibility:

> After hearing live testimony and considering the credibility of the different witnesses, this court concludes as a fact that no serious question about night work or reaction of

---

62 J.A. 146a.

63 J.A. 176a. Respondent argued in its Response to Plaintiff's Findings of Fact and Conclusions of Law that Boone "was not a credible witness." (J.A. 45a-46a).

> spouses was asked of any candidate besides the plaintiff. (Pet. App. 13.)

Both in his remarks during the closing arguments (J.A. 117a) and in his Findings of Fact the trial judge characterized what Boone had said to Kincaid on this subject as a "facetious remark" rather than a question. (Pet. App. 12a).

This dispute presented precisely the type of issue which could only be resolved on the basis of demeanor, and which was therefore not an appropriate subject for appellate review. Of the six people in the room when Kincaid was interviewed, Boone, Butler and Nichols each gave a different version of what was asked of Kincaid. Kincaid himself could not recall the questions, and neither McClennan nor Helms testified about the issue. In resolving the conflicting accounts of

Boone, Butler and Nichols[64] as to what had occurred at Kincaid's interview, the trial court could rely only on the demeanor of those witnesses, since there simply was no other evidence, such as a tape recording or contemporaneous notes,[65] on which to base a decision. Similarly, whether Boone's comment to Kincaid about his "new bride" was facetious is simply unknowable on the face of the cold record, but could of course have been quite clear to the trial judge who heard the tone of voice in which Boone described her remark. The trial court's characterization of Boone's statement as facetious, like his determination that her testimony was more

---

[64] The differences in the testimony of Butler and Nichols arguably undermined the credibility of both.

[65] Boone testified that she had told petitioner shortly after her interview that none of the male applicants were asked about night work. (J.A. 121a).

credible than the mutually conflicting accounts of Butler and Nichols, rests on information which by its very nature was available only to the judge who saw and heard the witnesses in person. Since the appellate courts are as a practical matter incapable of assessing the correctness of such trial court decisions, they are without authority to review them.

III THE FACT THAT A DEFENDANT OFFICIAL IS MARRIED TO A WORKING WIFE IS OF NO PROBATIVE VALUE IN A SEX DISCRIMINATION CASE

At trial respondent based its defense to a significant degree on proof that each of the four male members of the selection committee were married to wives who had worked at some point since their marriage. Butler, McClellan, Nichols and Helms were each asked by respondent's counsel to detail the employment history of their

wives.[66] Counsel for respondent argued that this evidence was relevant "[t]o show the witness is not prejudiced against a wife working at night." (J.A. 146a). The trial judge, however, attached no significance to this evidence.

In the Fourth Circuit respondent expressly urged that the employment history of the four wives was of controlling importance:

> [I]t is apparent from the personal circumstances of each of the four male selection committee members that none was prejudiced against female employment, or against females working at night....[67]

The court of appeals adopted the position advanced by respondent. Although acknowledging the existence of otherwise un-

---

[66] J.A. 146a, 153a-54a, 159a, 167a.

[67] Brief for Appellant, p. 35 (Emphasis in original).

contradicted evidence in support of petitioner's claim, the Fourth Circuit held:

> This evidence ... is dispelled by other portions of the record. For example, there is nothing to show the male committee members had a bias against working women. All four testified that their wives had worked and were accustomed to being away from home during evening hours.

(Pet. App. 61a).

In the view of the court of appeals, marriage to working women effectively immunized the male committee members from any charge of employment discrimination on the basis of sex. The Fourth Circuit rule apparently extends to male officials whose wives had ever worked at any time during their marriage; in this case only one of the four wives was actually employed at the time of trial,[68] and two of the four had

[68] J.A. 153a (McClellan's wife).

not worked for years.[69] The working wife defense, if sustained by this Court, would be available in most Title VII sex discrimination cases. Today over half of all married women are working outside the home;[70] the vast majority of all married women have held such jobs at some point after their weddings. Thus virtually every married male personnel official in the nation qualifies for the working wife defense now recognized in the Fourth Circuit.

The Fourth Circuit's working wife defense is itself based on the very type of sexual stereotyping which Title VII condemns. In early nineteenth century America, marriage to a working woman might have been the mark of an exceptionally

[69] J.A. 147a (Butler's wife), 167a (Helms' wife).

[70] Statistical Abstract of the United States 1983-83, p. 382, table no. 638.

liberated man. Not only was it then uncommon for wives to work outside the home, but in many states a married woman could neither sign an employment contract nor keep her earnings without the permission of her husband.[71] But the legal status of married women in the United States no longer resembles that of minor children. The Fourth Circuit's assertion that the actions of the wives in this case were a persuasive indicator of the motives of their husbands necessarily, if tacitly, assumes that the wives of the male committee members would not or could not have worked outside their homes unless their husbands approved. Title VII condemns precisely such "myths and purely habitual

[71] See E. Flexner, Century of Struggle, 8 (1959); S. Casteras, The Substance or the Shadow -- Images of Victorian Womanhood, 10-11 (1982).

assumptions about ... wom[e]n...." Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702, 707 (1978).

The courts of appeal's working wife defense is at odds with this Court's decision in Castaneda v. Partida, 430 U.S. 482 (1977). In Castaneda the district court had held that a prima facie case of discrimination against Hispanics in the selection of grand juries could be rebutted by evidence that a majority of the jury commissioners were themselves Mexican-American. This Court reversed, holding that "[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." 430 U.S. at 499. In light of the decision in Castaneda, the evidence in this case could not have been rebutted

by evidence that four members of the hiring committee were themselves working women; a fortiori the mere fact that the male members of the committee were married to working women could not be used in that manner.

Justice Blackmun's admonition in Castaneda regarding the many facets of human motivation applies with particular force to the Fourth Circuit's working wife defense. The husband of a working woman may have protested, indignantly but in vain, her decision to seek employment, or may have supported a decision that offended his personal views about marriage only because the couple was in financial difficulty. The actual experience of being married to a working woman might have aggravated a husband's resistance to such employment, or created prejudices where none existed before. In the instant

case two of the wives had held traditional women's jobs, school teacher[72] and nurse;[73] a husband who did not object to such employment might nonetheless resist hiring a woman for a position that had in the past ordinarily been held by men.

The political or social views of one individual can rarely if ever be reliably inferred from the actions or opinions of his or her friends, colleagues, or loved ones. The fact, for example, that Butler was a member of the all-male Optimist Club might support a claim that he had discriminated against women, but surely it would not be evidence that Butler's wife was likely to engage in such discrimination. In the instant case the fact that the wives of the male committee members had once worked is of no more significance

---

[72] J.A. 146a.

[73] J.A. 167a.

than would be proof that their mothers, sisters, or daughters of the male committee members were or had been employed. No one would seriously offer as proof of nondiscrimination evidence that a personnel official was dating the local chapter president of the National Organization for Women. Yet such a feminist paramour defense seems scarcely less plausible than the working wife defense actually adduced in this case.

CONCLUSION

For the above reasons, the judgment and opinion of the Fourth Circuit should be reversed and the case remanded with instructions to affirm the findings of the district court.

Respectfully submitted,

JONATHAN WALLAS
JOHN T. NOCKLEBY
Ferguson, Watt,
Wallas & Adkins, P.A.
Suite 730
951 S. Independence Blvd.
Charlotte, North Carolina
28202
(704) 375-8461

J. LeVONNE CHAMBERS
O. PETER SHERWOOD
ERIC SCHNAPPER*
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

Counsel for Petitioner

* Counsel of Record

JOINT

APPENDIX

Office - Supreme Court, U.S.
FILED
AUG 16 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1623

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PHYLLIS A. ANDERSON,

Petitioner,

v.

CITY OF BESSEMER CITY, etc.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

PHILIP M. VAN HOY*
Siegel, O'Connor & Kainen, P.C.
400 S. Tryon Street
Suite 3022
Charlotte, North Carolina 28285

ARTHUR C. BLUE, III
Whitesides, Robinson & Blue
246 West Main Avenue
Gastonia, North Carolina 28053

JONATHAN WALLAS
JOHN T. NOCKLEBY
Chambers, Ferguson, Watt,
Wallas & Adkins, P.A.
Suite 730
951 S. Independence Boulevard
Charlotte, North Carolina 28202

J. LEVONNE CHAMBERS
O. PETER SHERWOOD
ERIC SCHNAPPER*
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

Counsel for Petitioner

*Counsel of Record

PETITION FOR CERTIORARI FILED MARCH 30, 1984
CERTIORARI GRANTED JUNE 18, 1984

1983 P

BEST AVAILABLE COPY

TABLE OF CONTENTS

PAGE

Relevant Docket Entries 1a

Complaint, filed May 18, 1981 ..... 2a

Answer, filed November 30, 1981 ..... 5a

Memorandum of Decision, filed September 16, 1982 .... 7a

Defendant's Motion for Relief from Order, filed September 27, 1982 ..... 8a

Order, filed October 7, 1982 ..... 10a

Proposed Findings of Fact and Conclusions of Law, filed November 15, 1982 ..... 11a

Order, filed November 18, 1982 ..... 35a

Defendant's Response to Plaintiff's Findings of Fact and Conclusions of Law, filed December 10, 1982 .... 36a

Plaintiff's Reply to Defendant's Response to Plaintiff's Proposed Findings of Fact and Conclusions of Law, filed December 21, 1982 ..... 48a

Findings of Fact and Conclusions of Law, filed February 16, 1983 ..... 54a

Judgment, filed February 16, 1983 ..... 54a

Notice of Appeal, filed March 10, 1983 ..... 55a

Plaintiff's Exhibit No. 8—Duties of Recreation Director 56a

PAGE

Plaintiff's Exhibit No. 10—Resumé of Phyllis Ann Anderson 57a

Plaintiff's Exhibit No. 11—Resumé of Donald F. Kincaid 61a

Plaintiff's Exhibit No. 12—EEOC charge and Notice of Right to Sue 63a

Plaintiff's Exhibit No. 13—Determination by EEOC 66a

Plaintiff's Exhibit No. 14—March 18, 1975 letter from Mayor Ramsey to Mrs. Boone 68a

Plaintiff's Exhibit No. 15—May 1, 1975 letter from City Manager to Mr. Kincaid 70a

Plaintiff's Exhibit No. 18—Resumé of Burt Broadway 72a

Transcript of Proceedings, September 13, 1982 ..... 75a

Relevant Docket Entries

Date	*Proceedings*
May 18, 1981	Complaint
November 30, 1981	Answer of def[endant]
September 13, 1982	Non-jury trial begins
September 16, 1982	Memorandum of Decision. . . .
September 27, 1982	Defendant's motion for relief from order
November 15, 1982	Proposed Findings of Fact and Conclusions of Law, by pl[aintiff]
December 10, 1982	Response to pl[aintiff's] Findings of Fact and Conclusions of Law by defendant
December 21, 1982	Reply to def[endant's] Response to Pl[aintiff's] Proposed Findings, etc., by [plaintiff]
February 16, 1983	Findings of Fact and Conclusions of Law. . . .
February 16, 1983	Judgment. . . .
March 10, 1983	Notice of Appeal, by defendant. . . .

Complaint

(Filed May 18, 1981)

I. *Jurisdiction*

1. This is a proceeding for equitable and declaratory relief brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.* Jurisdiction exists pursuant to 28 U.S.C. §1343.

2. Jurisdiction is further invoked pursuant to 28 U.S.C. §§2201 and 2202, this being an action for a declaratory judgment declaring unconstitutional and illegal the acts of defendant complained of herein in violation of rights secured to plaintiff by the Civil Rights Act of 1964.

II. *Parties*

3. The plaintiff, Phyllis A. Anderson, is a female and resident of Bessemer City, North Carolina.

4. The defendant, City of Bessemer City, North Carolina is a municipal corporation.

III. *Facts*

5. On or about March 17, 1975, plaintiff submitted an application to defendant City of Bessemer City, North Carolina for the vacant position of Recreation Director.

6. Although plaintiff was qualified for the position, the defendant selected a man with less experience and qualifications than plaintiff.

7. Plaintiff was denied the position of Recreation Director by the defendant City of Bessemer City on the basis of her sex, female.

8. Plaintiff filed a timely charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") which was designated by EEOC as Charge No. 045751171.

9. The EEOC issued plaintiff a right to sue letter dated February 19, 1981. Plaintiff has filed this case within ninety days of receipt of this letter. Plaintiff has thus complied with all jurisdictional requirements of Title VII before initiating this proceeding.

10. The defendant has discriminated against plaintiff on the basis of her sex by denying her the position of Recreation Director and awarding the position to a less qualified male.

11. Plaintiff has been and continues to be irreparably injured by the discriminatory actions complained of herein. The injuries which plaintiff suffers are irreparable until enjoined by this Court; plaintiff has no other adequate or complete remedy other than this proceeding to have the practices of defendant complained of herein remedied.

WHEREFORE, the plaintiff prays that the Court:

A. Declare the actions complained of herein illegal and unconstitutional, and issue an injunction enjoining the defendant, its agents, employees, successors, attorneys and those acting in concert or participation with them and at their direction from engaging in the unlawful employment practices set forth herein and any other employment practices shown to be in violation of 42 U.S.C. §2000e.

B. Direct that defendant take such necessary steps as may be appropriate and necessary to eliminate the effects of its discriminatory actions including promotion and hiring of the plaintiff.

C. Award the plaintiff back pay and front pay with cost of living adjustments and interest.

Complaint

D. Award plaintiff the costs of this action, including reasonable attorneys' fees and expenses.

E. Grant such other and further relief as may be just and necessary to grant complete relief to plaintiff, including retention of jurisdiction of this action pending complete implementation of the relief ordered.

This the 18th day of May, 1981.

Respectfully submitted:

/s/ Jonathan Wallas
Ronald L. Gibson
Jonathan Wallas
Chambers, Ferguson, Watt, Wallas, Adkins & Fuller, P.A.
951 South Independence Boulevard
Charlotte, North Carolina 28202
704/375-8461

Attorneys for Plaintiff

Answer

(Filed November 30, 1981)

Defendant, answering the allegations of Plaintiff, says and alleges as follows:

First Defense

Defendant hereby denies Plaintiff's claim to relief on the basis of the statute of limitations.

Second Defense

Defendant, pursuant to Rule 12 B 6 of the Rules of Civil Procedure, hereby moves to dismiss Plaintiff's Complaint for failure to state a claim upon which relief may be granted.

Third Defense

Defendant hereby moves to dismiss Plaintiff's claim for declaratory relief because of the Court's lack of subject matter jurisdiction, this being an action unsuitable for declaratory relief under 28 USC Section 2201 and 2202.

Fourth Defense

Answering the specific allegations of Plaintiff's Complaint, Defendant states and alleges as follows:

1. Paragraph Number One of Plaintiff's Complaint is admitted, except insofar as it state that this is an action suitable for a declaratory relief.

2. Paragraph Number Two of Plaintiff's Complaint is hereby denied.

3. Paragraph Number Three of Plaintiff's Complaint is hereby admitted upon information and belief.

Answer

4. Paragraph Number Four of Plaintiff's Complaint is admitted.

5. Paragraph Number Five of Plaintiff's Complaint is admitted.

6. Paragraph Number Six of Plaintiff's Complaint is hereby denied.

7. Paragraph Number Seven of Plaintiff's Complaint is hereby denied.

8. Paragraph Number Eight of Plaintiff's Complaint, Plaintiff is without information as to the truthfulness or falsity of these allegations, and same are hereby denied.

9. Paragraph Number Nine of Plaintiff's Complaint, Plaintiff is without information as to the truthfulness or falsity of these allegations, and same are hereby denied.

10. Paragraph Number Ten of Plaintiff's Complaint is hereby denied.

11. Paragraph Number Eleven of Plaintiff's Complaint is hereby denied.

WHEREFORE, the Defendant prays the Court as follows:

1. That this action be declared frivolous and be dismissed, and that the Plaintiff recover nothing of the Defendant.

2. That the costs of this action be taxed against the Plaintiff.

3. That reasonable attorney's fees in this action be assessed against the Plaintiff in favor of the Defendant, because of the Plaintiff's frivolous prosecution of this cause.

Answer

4. For such other and further relief as to the Court may seem just and proper.

The 25 day of November, 1981.

GULLER AND KAKASSY

By: /s/ THOMAS B. KAKASSY
Thomas B. Kakassy
Attorney for Defendant
P. O. Box 2248
Gastonia, NC 28052
Telephone: (704) 864-9716

Memorandum of Decision

(Filed September 16, 1982)

[The Memorandum of Decision appears at pp. 1a-5a of the Petition]

Defendant's Motion for Relief from Order

(Filed September 27, 1982)

The defendant, the City of Bessemer City, moves the Court, pursuant to Rule 60 of the Federal Rules of Civil Procedure, for relief, on the basis of mistake, from the Court's Memorandum of Decision dated September 16th, 1982, in which the Court directed plaintiff's counsel to draft findings of fact and conclusions of law, if the parties did not resolve this case by October 4th, 1982.

The reasons for defendant's motion are:

1. The case has not been resolved by the parties. The Court has been so informed, by defendant counsel's letter to the Court dated September 23rd, 1982.

2. Findings of fact and conclusions of law drafted by counsel for a party are entitled to less "weight and dignity (than) . . . the unfettered and independent judgment of the trial judge" because of the adversarial tone of such findings. *Holsey* v. *Armour & Co.*, —— F. 2d ——, 29 FEP Cases 1067, 1068 (4th Cir., July 23, 1982) (copy attached), citing *The SEVERANCE*, 152 F.2d 916, 918 (4th Cir., 1945); *White* v. *Carolina Paperboard Corp.*, 564 F. 2d 1073, 1082-83, 16 FEP Cases 44 (4th Cir., 1977); and *Chicopee Mfg. Co.* v. *Kendall Co.*, 288 F.2d 719, 724-25 (4th Cir., 1961).

The relief sought by defendant through the instant motion is that the Court modify its Memorandum of Decision so that the findings of fact and conclusions of law be written by the Court, rather than by counsel for the plaintiff.

Defendant's Motion for Relief from Order

This the 23rd day of September, 1982.

CITY OF BESSEMER CITY,
NORTH CAROLINA

By /s/ PHILIP M. VAN HOY
Philip M. Van Hoy
400 South Tryon Street, Suite 3022
Charlotte, North Carolina 28282
Telephone (704) 377-5151

By /s/ ARTHUR C. BLUE, III
Arthur C. Blue, III
Whitesides, Robinson & Blue
246 West Main Avenue
Gastonia, North Carolina 28053
Telephone: (704) 864-5728

Attorneys for Defendant

Order

(Filed October 7, 1982)

Counsel for the defendant has moved for "relief, on the basis of mistake," from the court's memorandum of decision of September 16, 1982.

The memorandum correctly set out the decision of the court. There was no mistake in its form or its content. Counsel for the plaintiff are directed to proceed as provided in the memorandum. When the proposed findings and conclusions have been submitted, comment will as usual then be sought from defendant, so that, in final form, the findings and conclusions may reflect consideration of the input of both sides.

It Is So Ordered, this 7 day of October, 1982.

/s/ James B. McMillan
James B. McMillan
United States District Judge

Proposed Findings of Fact and Conclusions of Law

(Filed November 15, 1982)

Jonathan Wallas and Ronald L. Gibson, Chambers, Ferguson, Watt, Wallas, Adkins & Fuller, P.A., 951 South Independence Boulevard, Charlotte, North Carolina 28202, counsel for plaintiff;

Philip M. Van Hoy, Siegel, O'Conner & Kainen, P.C., 400 South Tryon Street, Suite 3022, Charlotte, North Carolina 28285; Henry Whitesides and Arthur C. Blue, III, Whitesides, Robinson and Blue, P.A., 246 West Main Avenue, Gastonia, North Carolina 28052, counsel for defendant.

Before James M. McMillan, District Judge

This case was tried without a jury on September 13 and 14, 1982. On September 16, 1982, a Memorandum of Decision was filed announcing the decision of the Court. Thereafter, proposed findings were drafted by counsel for the plaintiff and an opportunity was provided to the defendant to submit alternative findings or comment on plaintiff's submission. Having now reviewed both parties' proposals, considered all of the evidence, made credibility determinations where necessary and considered the arguments of counsel, the Court makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. This proceeding was commenced on May 18, 1981 by plaintiff, Phyllis A. Anderson, pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* (hereafter "Title VII"), seeking relief for violations of Title VII.

2. Plaintiff is a female citizen and resident of Bessemer City, North Carolina. The defendant, City of Bessemer City, is a North Carolina municipal corporation.

3. During February or early March, 1975, the defendant had a vacancy for the position of Recreation Director. The defendant advertised the position through the local newspaper, the Gastonia Gazette, and by word of mouth.

4. On or about March 16, 1975, plaintiff submitted a letter and resume as her application for the position of Recreation Director.

5. Prior to applying for the job, plaintiff had informally inquired about the job by talking to city council member Mrs. Bowser Boone. Prior to submitting her application, she had also talked with Neil Barnes, the then Superintendent of Water Works for the City. Plaintiff was told by Mr. Barnes that the Recreation Director position had been "wrapped-up" by the ultimate selectee, Donald Kincaid, a male.[1] Despite her conversation with Barnes, plaintiff applied for the position. However, because Barnes had indicated to her that Kincaid would receive the job, plaintiff set forth the following paragraph in her letter of application:

> I realize you will probably be giving stronger consideration for a male to fill this position. In this light, I would request that you review all qualifications equally, realizing women are assuming positions off (sic) leadership and responsibility in industry and government equal to those held by men.

6. The defendant received applications for the Recreation Director job from about eight individuals, each of

[1] After the selection process for the Recreation Director job was completed, Barnes reiterated to the plaintiff his opinion that Kincaid had the position "wrapped-up" all the time.

whom was interviewed by a Committee consisting of Mrs. Boone, Josiah Butler, William McClellan, Frank Nichols, and Timothy Helms. The Committee was appointed by the defendant's mayor, and Mrs. Boone, the only woman on the Committee, was appointed chairperson.

7. The defendant established no written qualifications for the position of Recreation Director, nor were the job duties of Recreation Director provided to applicants or the selection Committee prior to the time the selection was made. There was, however, a clear requirement that the person selected must live within the City or be willing to relocate there. No guidelines to assist the Committee in selecting the new Recreation Director were provided to the Committee or developed by it. Each Committee member was given one vote, and each member was free to use whatever selection criteria he or she deemed appropriate.

8. Committee members had access to the applications filed by applicants. Both plaintiff and Kincaid filed written letters of application and resumes and both were interviewed. During her interview with the Committee, plaintiff was asked, in addition to what programs she would implement as Recreation Director, certain specific questions concerning the requirements of the job and her ability to meet those requirements.[2] Mrs. Anderson, for example, was asked (a) if she realized that there would be night work involved, (b) whether she realized that

[2] Committee member Helms testified at trial that plaintiff began her interview by stating that the Committee would not select her because she was a woman. However, the Court finds that the plaintiff did not begin her interview with such a statement. No other Committee members testified about such a statement. Helms may have been confused by the statement in plaintiff's March 16 letter quoted above in Paragraph 5 or by Mrs. Boone's contention communicated by her to the other Committee members that plaintiff was not selected for the job because of her sex.

there was a possibility that there would be travel throughout the County and meetings with other directors, and (e) how her husband felt about her applying for the job. Plaintiff was the only female applicant; none of the male applicants for the position were asked these specific questions or similar ones.

9. The general consensus of the Committee was that one applicant, Bert Broadway, who was then employed as a Recreation Director in another city was the most qualified applicant. Broadway, however, was eliminated from consideration during his interview because he indicated he would not relocate to Bessemer City.

10. When the interviews were completed, the Committee voted. The four male members of the Committee voted for Kincaid; Mrs. Boone voted for the plaintiff. All Committee members agreed plaintiff was qualified for the job. The primary reason given by the male Committee members for the selection of Kincaid was the fact that he had a college degree in health and physical education. Mrs. Boone voted for the plaintiff because she felt plaintiff's experience and other qualifications were superior to those of Kincaid. Mrs. Boone also contended that the male members of the Committee had not voted for plaintiff because of her sex. She based her conclusion concerning sex discrimination on the fact that plaintiff had been asked certain questions (see Paragraph 8 *supra*) not asked males which implied a different standard of evaluation was being applied to the plaintiff and the fact that some Committee members seemed to emphasize the traditional male sports portion of the Recreation Director duties.

11. After the Committee's vote, Kincaid was then offered the job which he accepted. After Kincaid was selected he was sent a list of job duties for the Recreation Director

position. These duties had not been provided to any of the applicants prior to the interview process.

12. Sometime shortly after Kincaid's selection was made public, the plaintiff talked with Mrs. Boone, who advised plaintiff that she thought plaintiff was the best qualified candidate, that during the selection process some of the Committee members had emphasized traditionally male sports to the derogation of the other duties of the Recreation Director, and that, in Boone's opinion, the Committee had not looked at the total qualifications of the candidates. Mrs. Boone further advised the plaintiff that plaintiff had been asked the questions in her interview about night work, the necessity for travel and her spouse's reaction to her seeking the Recreation Director job which had not been asked of any of the male applications in their interviews.

13. Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission on March 31, 1975. Notice of Right-to-Sue was issued February 19, 1981, and plaintiff initiated this proceeding within ninety days of her receipt of that Notice.

14. The plaintiff contended at trial that she was more qualified for the Recreation Director position than Donald Kincaid and that she had been denied the job because of the pre-conceived sexually discriminatory attitudes and predelictions of the male members of the Committee. The defendant asserted at trial that Kincaid was the more qualified, that the Committee members had no pre-conceived sexually stereotypical notions and that their selection was based solely on merit. Having evaluated all the evidence, the Court concludes (a) that the job of Recreation Director was not one necessarily requiring a college degree in health and physical education (a degree possessed by Kincaid and not by the plaintiff), but rather was a job requiring

a diversity of talents and skills; (b) that the contention of the defendant that Kincaid was selected because of his particular degree is not supported by the evidence; (c) that if the total qualifications of the candidates are fairly evaluated the plaintiff was the most qualified applicant[3] for the job; and (d) that the plaintiff was denied the job because of her sex.

15. The first step in deciding who was the most qualified applicant for the job is to review the stated or implied duties and responsibilities of the Recreation Director position. The Court's task is rendered more difficult because the defendant established no written qualifications or criteria for the position prior to Kincaid's selection and only a limited list of job duties were sent to Mr. Kincaid after his selection. However, from the testimony of the Committee members, the list sent to Mr. Kincaid and the other evidence, the Court concludes the job of Recreation Director was to fashion and and implement a well-rounded recreation program for all of the citizens of the community. The Recreation Director was to prepare and implement programs in baseball, basketball, volleyball, swimming and similar sports as well as in art, music, dance, drama, crafts and similar activities for persons of all ages and interests. The position required the ability to develop various types of recreational programs, to teach, to manage and to communicate with people of all ages, backgrounds and interests. In addition, it was likely the Recreation Director would have to manage swimming and other community facilities, select umpires, life guards and perhaps instructors for various activities, develop and handle budgets and perhaps funds and make plans for future recreational facilities. The Court concludes that the task of the selection

[3] The qualifications of Mr. Broadway, who was eliminated by all members of the Committee because he was not willing to relocate, have not been considered by the Court in making this finding.

Committee was to choose the candidate whose education, training, background, work experience and other life experiences indicated would best be able to handle the diverse duties of the job.

16. A comparative review of the qualifications presented by the plaintiff to the Committee and those presented by Donald Kincaid demonstrates that Ms. Anderson's qualifications were superior to those of Mr. Kincaid.

(a) *Education*

Plaintiff received an Bachelor of Science Degree from Sacred Heart College in 1963 or 1964 (a junior college degree) and also received a BA Degree from Sacred Heart in elementary education in 1973. In addition to her college degrees, by March 1975 plaintiff had taken government and history courses and a decoupage course at Gaston College in 1973 and 1974, and had taken logic and guidance courses in 1974 from Belmont Abbey College.

Mr. Kincaid's post high school education as of March 1975 was a B.S. Degree in health and physical education which he received in May 1974 from Appalachian State University.

(b) *Certification in Recreational Direction*

As of March 1975, the plaintiff had a North Carolina State Recreational Director certificate which she received about 1957.

As of March 1975, Mr. Kincaid had no recreational director certification.

(c) *Employment History*

Plaintiff was in charge of supervising activities in the Recreation Department of Broughton Hospital from about 1956 through about 1957. In her job at Broughton she

planned various activities including dances and other arts and helped supervise various ball games and similar activities. In addition, plaintiff had worked for a group of doctors as a receptionist and bookkeeper and had worked as a part-time sales clerk for Belk Stores while she went to school from 1961 to 1963. In her job with the doctors she had to manage funds and was often in contact with the public. From about 1963 to 1973, plaintiff worked as a substitute teacher in Gaston County Public Schools teaching in all grades. While working as a school teacher, plaintiff had to plan activities for school children of all ages inside and outside the school, teach physical education, music and art, as well as the normal academic subjects. Beginning about 1973, plaintiff began teaching third grade at Carr School in Dallas, North Carolina where she was teaching as of March 1975.

Mr. Kincaid engaged in student teaching in Mountain City, Tennessee during the winter of 1973-1974 as part of his college work. Following his graduation from college in May 1974, Kincaid worked for Commercial Credit Corporation in the finance department. He indicated on his application for the Recreation Director job that he gained experience working with the public while at Commercial Credit. Kincaid had also sold life insurance at some time prior to March 1975 although this experience was not listed on his resume.

(d) *Experience in Recreational Director Work*

Plaintiff had worked in the recreation department of Broughton Hospital for about two years as discussed above planning various activities from sports to music and the like and supervising other employees.

As of March 1975, Kincaid had no experience in recreational direction; he had never supervised any employees.

(e) *Supervisory Experience*

Plaintiff had supervised other employees while working with Broughton Hospital. She also had years of experience supervising children in a variety of activities including sports. Finally, the offices she held in various civic organizations required her to lead various programs and activities.

Mr. Kincaid had no supervisory work experience and had limited supervision of children during his student teaching and with the little league.

(f) *Civic Activities*

The plaintiff listed on her job application an extensive list of civic activities she had engaged in prior to March 1975. These included her membership in the Exchangette Club when she lived in Tennessee for which she organized various activities for the members and was in charge of meetings. She served as President, Vice President as well as chairwoman of various committees for the Exchangette Club. In addition, plaintiff had been active in the Jaycette Club in Bessemer City as well as the Bessemer City Order of the Eastern Star, where she served as an officer. These extensive public and civic activities involved the plaintiff in many facets of the community and also gave her opportunities to engage in public speaking.

Kincaid listed no civic activities in his resume. He testified that after his college graduation he became involved in coaching little league basketball in a Bessemer City Optimist Club league.

(g) *Experience and Activity with Respect to Recreational Matters*

Prior to March 1975, the plaintiff had been personally active in a number of sports. She had played basketball and softball in her school days and also had been involved

in her own children's activities in local athletics. In addition, as part of her school activities she had planned physical education activities and had actively supervised children on the playground playing various sports. Plaintiff specifically noted on her resume that she could play the piano, that she had experience in music direction and that she had taken a decoupage course. She had a basic knowledge in all sports, had experience in umpiring, had first aid knowledge and was an experienced public speaker. The plaintiff in her civic and school activities (such as school trips) helped to raise funds and gained experience in budgeting and bookkeeping. While working at Broughton Hospital and teaching she had instructed adults and children in sports and arts and crafts. She stated on her resume that she enjoyed indoor and outdoor sports and that she was in good health.

Kincaid had been active in all major sports including basketball, football, baseball, volleyball, track and soccer as he grew up, had played certain sports in high school and had engaged in intramural sports activities at Appalachian State. He had also taken courses as Appalachian State in teaching others how to perform these sports activities as well as courses in public speaking, first aid and organizing and administering physical education.[4] His resume indicates he was interested in coaching, reading, and music.

17. The Court concludes from a review of the evidence that the plaintiff was more qualified than Donald Kincaid for the job of Recreation Director. Plaintiff had a wealth of employment and other experience in a wide ranging variety of jobs and civic activities. She had planned and

[4] The Committee did not ask Kincaid about his college course work during his interview. Such a failure would imply that the Committee did not feel the type of courses he had taken were important.

implemented a variety of sports, arts and other activities for persons of various ages. She had worked with children in school and with adults at Broughton and in her civic activities. She had prepared and managed budgets and money and had developed public speaking and other communicative skills. She was a mature and experienced worker and mother. She had a lifetime interest in a variety of sports, had participated and instructed in various sports and was interested in sports and the other activities which would be part of the Recreation Director job. The plaintiff had a college degree and had also taken additional courses to broaden her background and skills.

Comparatively, Mr. Kincaid was personally skilled in sports and had taken courses in teaching sports and other activities. His work history was limited, however, as was his experience in working with a variety of people or in managing and supervising facilities and people. His only job of any consequence prior to March 1975 was with a finance company and he had virtually no experience in supervision or management. While Kincaid had a health and physical education degree, the plaintiff's teaching degree, work experience and other qualifications gave her not only skills in teaching and planning sports activities but also provided additional skills in the other areas called for by the job.

18. The Court has also reviewed all of the evidence and has concluded that plaintiff was not selected for the Recreation Director position because the male members of the Committee were predisposed to hire and preferred to hire a male for the job. The Court has reached this finding by reviewing the entire record, especially the various reasons articulated by the defendant and the Committee members for selecting Kincaid over the plaintiff. This evidence, detailed below, indicates that plaintiff was not selected for

the job because of her sex and the Court so finds. The Court bases this finding on the following:

(a) No selection criteria were devised for the position, and the Committee members used various conflicting standards to decide who to select. While the fact that no standards were established for filling the position does not violate the law, the lack of any articulated criteria left the way open for Committee members to allow their own improper biases (here preference of a male for the job) to affect their votes. The evidence catalogued below indicates that the male Committee members preferred a man for the job.

(b) The Committee asked the plaintiff certain stereotypical questions (See Paragraph 8 *supra*) which were not asked of the male applicants for the job. These questions as well as other evidence implied a belief that a woman should not work at night in a job such as Recreation Director because it would upset her family life. The particular questions standing alone would be of little significance; however, the fact that only the plaintiff was asked them tends to show a different standard was used to evaluate female applicants. The plaintiff was not the only applicant with a family. Mr. Kincaid had a wife and children. The fact that the plaintiff (but no males) was asked these questions tends to indicate the use of a different standard for women.

(c) The most frequently articulated reason for selecting Kincaid was that he had a degree in health and physical education while the plaintiff did not. However, the Committee's first choice, Mr. Broadway, had no college degree at all, much less one in physical education. The actions of the Committee (in initially selecting Broadway) as well as the trial testimony make it clear that a college degree in physical education was neither a stated prerequisite for

the position nor necessary for the proper performance of the Recreation Director job. When Committee members were asked about the fact Mr. Broadway had no college degree, they replied that he was their top choice because of his work experience. As discussd above, plaintiff's work experience and other qualifications were superior to those of Kincaid. They were simply ignored by a majority of the Committee. The Court finds that the emphasis on Kincaid's degree was a post-hoc attempt by the defendant to justify a decision that was really based on sexual stereotype and bias and is merely a pretext articulated to mask discrimination.

(d) Several Committee members had worked with Kincaid through the all-male Optemist little league. This prior contact may have tilted them toward Kincaid. Mr. Butler had mentioned the Recreation Director vacancy to Kincaid. More important, Committee members Butler and Nichols emphasized throughout the selection process the traditionally male sports that would be only a part of the Recreational Director job. Nichols called the job "athletic director".

(e) Butler testified that he had solicited applications from two males (including Broadway) for the job. However, despite the fact that he stated he knew two women well qualified for the Recreation Director position, he did not seek applications from them.

(f) Although Kincaid was never asked about his college curriculum, Butler testified that he assumed Kincaid had received college training for the Recreation Director job. Butler voted for Kincaid even though he knew Kincaid had never prepared a budget, supervised any employees or even worked in a recreation program. Similarly, Butler testified he assumed that the two woman he believed were qualified for the Recreation Director job would not have been interested in the job because they would have had

to take a pay cut. He made no such assumptions as to the males he suggested apply for the job.

(g) Committee member Nichols made it clear that he preferred a man for the job. He was concerned about the job's long hours and stated "it would have been hard for a lady" to perform the work. He specifically stated he would not want his wife to have the job.

(h) Although one Committee member (Helms) claimed to be influenced by the program presented by Kincaid for the job, another Committee member (McClellan) felt the plaintiff had presented an equally good program.

19. The Court thus finds that the male members of the selection Committee did not make a fair and even-handed evaluation of the candidates. They asked the plaintiff questions not asked the males, encouraged men to apply but did not so encourage admittedly qualified women, alternatively emphasized education or experience depending on which emphasis benefitted the pertinent male, made favorable assumptions about Kincaid's qualifications while ignoring the plaintiff's vast experience and superior qualifications, and mischaracterized the plaintiff's interview and program. The Court concludes she was not selected because of her sex.

20. Plaintiff suffered monetary loss as a result of the denial of the recreation director job. Her evidence showed that her earnings from March 1975 through trial were $65,402 while the earnings of Mr. Kincaid for the same period were $95,799. She also suffered the loss of use of the difference in earnings.

CONCLUSIONS OF LAW

1. This action is properly before the Court, the Court has jurisdiction of this action under Title VII, and all procedural requirements of Title VII have been met.

2. The evidentiary standard and allocation of burden of proof applicable to this case is set forth in *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), where the Supreme Court refined the basic allocation of burdens and order of presentation of proof set forth in *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Plaintiff has the burden of proving by the preponderance of the evidence a *prima facie* case of discrimination. If the plaintiff succeeds in proving a *prima facie* case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for plaintiff's rejection. 411 U.S. at 802. The ultimate burden of persuading the Court that defendant discriminated against plaintiff remains with plaintiff. *Burdine*, 450 U.S. at 253. Under *Burdine*:

> The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position, for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination. * * * Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the [applicant]. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case. 450 U.S. at 253-54.

2. Plaintiff's evidence satisfies her burden of showing that she applied for the position, was qualified, but "was

rejected under circumstances which give rise to an inference of unlawful discrimination." *Burdine*, 450 U.S. at 253.

3. Plaintiff was rejected under circumstances which give rise to an inference of unlawful discrimination. She was asked sex stereotypical questions as set forth more completely above that were not asked of the other applicants. Plaintiff's combination of education and experience made her the best qualified candidate for the particular job, particularly after Mr. Broadway was eliminated from consideration because he would not relocate to Bessemer City.

4. Once plaintiff has established a prima facie case of unlawful discrimination the burden shifts to the defendant:

> . . . to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. *Burdine*, 450 U.S. at 254-55.

5. The defendant's articulated reason for plaintiff's rejection is that Mr. Kincaid had a college degree in health and physical education and college courses which plaintiff did not possess and that Mr. Kincaid was more qualified

than plaintiff. This production satisfies the defendant's burden of articulation. If the Court finds that the defendant has produced a legally sufficient and nondiscriminatory reason for not selecting plaintiff, plaintiff must have a full and fair opportunity to demonstrate pretext. *Burdine*, 450 U.S. at 256. Plaintiff may demonstrate that the proffered reason was not the true reason for her rejection either (1) directly, by persuading the Court that a discriminatory reason more likely motivated the defendant; or (2) indirectly, by showing that the defendant's proffered explanation is unworthy of credence. *Burdine*, 450 U.S. at 256. *McDonnell-Douglas*, 411 U.S. at 804-805. Plaintiff may meet her burden by offering additional evidence or may demonstrate pretextuality from the evidence and inferences properly drawn therefrom which were presented as part of her *prima facie* case.

6. The Court, applying the standards set forth above, concludes that the defendant's stated reasons for plaintiff's rejection are pretextual. The defendant applied the college degree "requirement" to support its decision to hire Mr. Kincaid, but relied on experience to support its initial decision to hire Mr. Broadway. The Committee asked plaintiff sexually stereotypical questions not asked of male applicants. One Committee member solicited applications from males but did not solicit them from women he deemed qualified. Another, by indicating it would be very hard for a women to do the job, in effect required a higher standard of women. In the interviews, some male Committee members emphasized the traditional male sports despite the fact the recreation director job involved working with a variety of programs, sexes and ages. Assumptions were made that favored Kincaid (such as what courses he had taken and what he would have learned in the courses) while the plaintiff's experience was ignored. For all of the above reasons and for the reasons set forth in the findings of fact

above, the Court concludes the reason advanced by defendant for Kincaid's selection are pretextual.

Absent the biases and sexual stereotypes which influenced the Committee's decision, plaintiff would have been hired as Recreation Director since she was the best qualified candidate. The sexual biases of the Committee members played a substantive and decisive role in the hiring decision. *Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U.S. 274, 287 (1977).

7. Where selection is based on subjective factors, a defendant's articulations must be carefully scrutinized. In *Coble* v. *Hot Springs School District No. 6*, 682 F.2d 721 (8th Cir. 1982), the selectee was considered to be the better qualified candidate on the basis of certain subjective factors, workshop experience and availability as measured by attendance. This explanation satisfied the defendant's burden of production by articulating legitimate, nondiscriminatory reasons for plaintiff's rejection. In attempting to rebut defendant's articulation, however, plaintiff argued that the true reason she was rejected was because she was a woman with children and the selecting officials assumed that her family responsibilities would interfere with her work performance. During her interview for the job at issue, plaintiff Coble and the selecting officials discussed her attendance record, the number of days missed attributable to family illness, her children and their ages, and whether she could handle the long hours required by the position. The District Court found that defendant's proffered reason for the non-selection of plaintiff was the true reason for the employment decision. The Court of Appeals reversed this finding as clearly erroneous and remanded the case with directions to grant appropriate relief:

> Although not illegal per se, subjective promotion procedures are to be closely scrutinized because of their susceptibility to discriminatory abuse. The mere fact that the subjective process is intended to recognize merit does not necessarily alleviate its susceptibility to discriminatory abuse. *When the evaluation is in any degree subjective and when the evaluators themselves are not members of the protected minority, the legitimacy and undiscriminatory basis of the articulated reason for the decision should be subject to particularly close scrutiny by the trial judge* (emphasis supplied) 682 F.2d at 726-27, citing *Royal* v. *Missouri Highway & Transportation Comm'n*, 655 F.2d 159, 164 (8th Cir. 1981).

In *Muntin* v. *California Parks and Rec. Dept.*, 671 F.2d 360 (9th Cir. 1982), a female plaintiff sought a traditionally male deckhand position. The hiring officer testified during depositions and at trial that he would not want to work with women deckhands, that he did not think women should be standing night watch, and that there would be sexual problems with a woman working as a deckhand. The Court concluded that this testimony, as a matter of law, demonstrated a discriminatory animus. 671 F.2d at 362. See also, *Williams* v. *Hoffmeister*, 520 F.Supp. 521, 536 (E.D.Tenn. 1981); and *EEOC* v. *Spokane Concrete Products*, 534 F. Supp. 518, 522 (E.D.Wash. 1982).

8. A close examination of the evidence shows that the hiring committee in this case was motivated by discriminatory reasons. See *Stone* v. *D.A.&S. Oil Well Servicing, Inc.*, 624 F.2d 142 (10th Cir. 1980); *Sherkow* v. *State of Wisconsin*, 630 F.2d 498, 503 (7th Cir. 1980). The type of questions asked only the plaintiff and the other evidence discussed above demonstrate the Committee had predetermined that a male was to be favored for the job. Only plaintiff was asked questions about what her spouse thought of the job and concerning how her family would be affected

if she worked nights. Moreover, the plaintiff's qualifications for the job were superior to those of Mr. Kincaid, a young man fresh out of school with little work experience. Mr. Kincaid was chosen, because the majority of the Selecton Committee believed only a male could supervise "male" sports and because the "male oriented" aspects of the program were improperly emphasized. As the Fifth Circuit summarized:

> Courts must be extremely careful to determine that the reasons given for selecting a male applicant over a female applicant are not simply a ruse disguising true discrimination. Courts must further carefully scrutinize the employer's explanations for its conduct once the aggrieved employee has proved a prima facie case of discrimination. If the capacity or competency distinction upon which the employer's selection is based inheres in the nature of an employee as a man or a woman, or typical culturally-based concepts of the abilities of peoples to perform certain tasks because of their sex to creep into its thinking, then Title VII will come to the employee's aid. The line that must be drawn is a fine one—because interpreting an employer's motives on the basis of its actions is at times hazardous, especially when there exists potentially valid and seemingly plausible business explanations as to such actions which in fact mask a true intent to discriminate.

Pond v. *Braniff Airways, Incorporated*, 500 F.2d 161, 165-66 (5th Cir. 1974). See also *Woody* v. *City of West Miami*, 477 F.Supp. 1073, 1079-80 (S.D.Fla. 1979). Careful review of the employer's explanation here demonstrates it was plaintiff's sex, not her alleged lack of relative qualifications, which led to her being denied the position.

9. The Court concludes, as a matter of law, that plaintiff has been discriminated against because of her sex in violation of Title VII, and is entitled to be made whole. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975); *White* v. *Carolina Paperboard Corp.*, 564 F.2d 1073 (4th Cir. 1977). Plaintiff is entitled to back pay based on the difference between her earnings and Mr. Kincaid's earnings in the position.[5] See *EEOC* v. *Korn Industries, Inc.*, 662 F.2d 256 (4th Cir. 1981). Under the law of this Circuit, the appropriate pre-judgment interest rate is not necessarily the legal rate of the state where the violation occurred. *EEOC* v. *Liggett & Myers, Inc.*, —— F.2d —— (No. 81-2186, 4th Cir. 1982). The purpose of the back pay provision of Title VII is to "make whole" the victims of discrimination. *Albemarle Paper Co.* v. *Moody, supra.* However, it does not fully restore a discrimination victim merely to pay that person her back pay, dollar for dollar, without taking into account the effects of inflation, among other factors. For example, a dollar earned in 1975 is worth only about $.55 if not paid until 1982. In order to give a dollar the same purchasing power today as it had in 1975, a payment of $1.81 would be required. Consequently, the Court concludes that the "make whole" principle underlying Title VII requires, at the very least, that Ms. Anderson be given an amount of back pay that has the same purchasing value as the salary she should have received during each of the years from 1975-1982.

---

[5] Normally, plaintiff would also be entitled to receive the Recreation Director job. However, the plaintiff indicated at trial that, given the passage of time, she would not insist that Mr. Kincaid be replaced. The Court agrees that Mr. Kincaid is an innocent victim of defendant's discrimination and that, no "bumping" should be ordered. Although there are pursuasive arguments that front pay should be substituted for reinstatement, the Court concludes back pay with appropriate interest and counsel fees is the most equitable remedy at the present time.

The most commonly used index to calculate such changes is the Consumer Price Index (CPI). An adjustment based on the CPI will give plaintiff 1982 dollars worth what she would have received absent discrimination and is especially appropriate in this case where plaintiff is not awarded reinstatement or front pay.[6] The plaintiff's back pay[7] with adjustment thus is $41,830, calculated as follows:

Year	Kincaid's Wages	Anderson's Wages	Difference	Adjustment Factor	1982 Dollar Amount
March 1975 to Dec. 1975	$ 6,679	$ 1,827	$4,852	(1.81)	$ 8,782
1976	9,885	6,833	3,052	(1.71)	5,219
1977	10,169	7,890	2,279	(1.60)	3,646
1978	12,158	8,776	3,382	(1.49)	5,039
1979	13,286	10,333	2,953	(1.34)	3,957
1980	15,031	10,591	4,440	(1.19)	5,284
1981	17,451	11,648	5,803	(1.08)	6,267
Jan. 1982 to date of trial	11,140	7,504	3,636	(1.00)	3,636
		Total back pay expressed in 1982 Dollars			$41,830

[6] This adjustment awarded by the Court is in lieu of normal pre-judgment interest. Alternatively, the Court would award pre-judgment interest at the appropriate rate.

[7] The evidence of Mr. Kincaid's wages was presented as a lump sum at trial. In a letter from Mr. Van Hoy to Mr. Wallas dated October 28, 1982, defendant provided a more detailed breakdown of the pertinent figures. The figures contained in that October 28 letter are hereby made a part of the record in this case.

[8] As discussed above, interest is awarded to equal inflation as measured by changes in the Consumer Price Index (CPI). For

(footnote continued on following page)

10. Plaintiff, as prevailing party, is entitled to recover her costs and expenses, including reasonable attorney's fees. A separate order is being entered herewith concerning fees, costs and expenses.

11. Plaintiff is also entitled to injunctive relief prohibiting future discrimination.

12. A Judgment will be entered with these Findings of Fact and Conclusions of Law.

This ..... day of ....., 1982.

James B. McMillan
United States District Judge

(footnote continued from previous page)

example, in 1975, the CPI was 161.2, while by 1982 it had reached 292.8. Interest on the 1975 loss of $4,852 is thus calculated by multiplying the principal of $4,852 by a factor of 1.81. Similar calculations are made for the other years using the then pertinent CPI indices as set forth:

Year	Consumer Price Index (1967=100)	Inflation Adjustment Factor (Nov. 1982=1.00)
1975	161.2	1.81
1976	170.5	1.71
1977	181.5	1.60
1978	195.3	1.49
1979	217.7	1.34
1980	247	1.19
1981	242.3	1.08
1982	292.8	1.00

Plaintiff's Proposed Judgment

(Filed November 15, 1982)

CIVIL ACTION No. C-C-81-204-M

In accordance with the Findings of Fact and Conclusions of Law and the Order Concerning Fees entered herewith, IT IS ORDERED, ADJUDGED, and DECREED:

1. That the defendant is hereby enjoined from discriminating against the plaintiff in hiring or in other terms and conditions of employment because of the plaintiff's sex.

2. That plaintiff have and recover from the defendant back pay in the sum of ..... The defendant is directed to pay additional interest on said sum at the rate of 8% from this date until this amount is paid.

3. That plaintiff is allowed the costs of this action, including reasonable attorney's fees and expenses, in the amount of ..... plus interest at 8% from this date until said sum is paid.

This ..... day of ....., 1982.

United States District Judge

Order

(Filed November 18, 1982)

Plaintiff has submitted proposed findings of fact and conclusions of law in the above-captioned case, pursuant to the court's memorandum of decision, filed September 16, 1982.

Defendant has indicated a desire to respond.

Defendant is invited to respond in a manner that will be helpful to the court. For example, if defendant believes a particular finding is not supported by the evidence, it should specify which portion of the finding is not supported by the evidence, provide references to the trial transcript and exhibits which support its position, and suggest language that should be substituted for plaintiff's proposed finding. Conclusory statements about defendant's objections to proposed findings or conclusions will not be of aid to this court.

Defendant has until December 13, 1982, to file such a response to plaintiff's proposed findings of fact and conclusions of law.

IT IS SO ORDERED, this 17 day of November, 1982.

/s/ JAMES B. MCMILLAN
James B. McMillan
United States District Judge

Defendant's Response to Plaintiff's Findings of Fact and Conclusons of Law

(Filed December 10, 1982)

CIVIL ACTION No. C-C-81-0204

In accordance with the Court's Memorandum of Decision which followed the trial of this action, plaintiff's counsel has drafted Findings of Fact and Conclusions of Law. By its Order of November 18th, 1982, the Court has invited the defendant to respond to the plaintiff's findings and conclusions, which defendant does by the matters set out below. References to the record are abbreviated herein, "F&C" for findings and conclusions, and "Tr." for trial transcript, immediately followed by the page references.

I. SELECTION CRITERIA UTILIZED BY THE SELECTION COMMITTEE

The findings and conclusions indicate, in reference to the work of the selection committee which chose Donald Kincaid over the plaintiff, that no selection criteria were devised (F&C 14), that various conflicting selection standards were used (F&C 14), that no standards were established (F&C 14), and that the selection of Kincaid over the plaintiff was based on subjective factors (F&C 22). These findings, each of them and they collectively, are not supported by the record, as the testimony of the four members who first voted for Kincaid indicates:

A. Josiah Butler: Butler's vocation for six years was that of a high school athletic coach. For eight years, he served as Youth Activities Director of the Bessemer City Optimist Club, which during that time had the entire responsibility for the operation of Bessemer City's recreation program. In addition, he personally holds a college degree in physical education (Tr. 92, 96). His personal education in physical education provided him with direct,

personal knowledge of the curriculum of a physical education graduate such as Donald Kincaid (Tr. 97, 108). Also, he had personally worked with Mr. Kincaid in the Bessemer City recreational program specifically, in such activities as coaching, organizing programs, and scheduling of events (Tr. 95, 107-108).

B. Harold McClellan: At the time of the selection of the City's Recreation Director, in 1975, Mr. McClellan was a member of the Recreation Committee of defendant. He also then had responsibility for the Bessemer City United Fund's recreation center (Tr. 111).

C. Eugene Nichols: In 1975, Mr. Nichols was the Youth Director of the Bessemer City Optimist Club, which then managed the defendant's recreation program. In addition, he was on the defendant's Recreation Committee (Tr. 116-117).

D. Timothy Helms: Mr. Helms was a member of defendant's City Council in 1975 (Tr. 127).

The significance of the above experiences of the selection committee members is that each, in fact, had direct, personal experience and responsibility for running recreation programs, in the City of Bessemer City specifically. From their respective duties and experiences, each knew personally what programs and responsibilities were involved, and they thus were each qualified to invoke their own knowledge in judging the qualifications of the various individuals who applied for the job of Recreation Director. Since their individual training and/or experience were directly related to the position to be filled, their individual and collective determinations of the qualifications of the applicants were not "subjective," but were instead based on specific, personal experience in, and in some cases training for, the

very position for which they interviewed applicants. To conclude otherwise would be analogous, for example, to conclude that the Board of Law Examiners is not qualified, through its charge or through its collectve education and experience, to rule on the qualifications of applicants for the bar, because the Board is not told what specific questions to ask of applicants.

II. Neil Barnes Purported Conversations With the Plaintiff Concerning the Alleged Preselection of Kincaid

The plaintiff's findings and conclusions emphasize an alleged conversation between the plaintiff and Neil Barnes, for the proposition that the selection of Kincaid was a fait d'accomplis before the interview of the plaintiff and the other applicants (F&C 2-3). This is neither probative nor relevant. Barnes was not on the selection committee (Tr. 6, 8, 28). The plaintiff herself admitted that Barnes did not tell her that anyone on the selection committee had told him that iKncaid had been appointed for the position before the job interviews were conducted (Tr. 28-29). In short, this testimony indicates no bias, nor even anything at all about the selection process which involved anyone who played a part in it. Furthermore, Barnes was on plaintiff's witness list, was available to testify throughout to substantiate plaintiff's burden of proof, and yet was not called to testify.

III. Interview Questions About Applicants' Families' Reaction to Woring at Night

Questions about applicants' amenability to night work were job-related and relevant, since the job required duty at night, and since the members of the selection committee knew that night work was required from their respective

personal experiences with the Bessemer City recreation programs (ref: I., *supra*).

Plaintiff's findings and conclusions declare repeatedly that this "stereotypical" line of questions by the selection committee was asked of the plaintiff, and *only* of the plantiff (F&C 4-5, 6, 15, 17, 19, 23, 24). In fact, this finding is not supported by the record:

1. The plaintiff did not specify *who* asked her about work at night, although she claims to remember that the question was asked of her, and she further claims to remember exactly how it was asked (Tr. 8, 29-30). She had no personal knowledge of whether similar questions were asked of other applicants (Tr. 30). She did admit, however, that the elusive question was posed to her by only one of the five-member committee (Tr. 31).

2. Plaintiff's witness Boone never testified that other applicants were not asked about family reactions to night work; when asked about this, her reply was "Not that I recall" (Tr. 48).

3. Ms. Boone specifically testified that *she herself* asked Kincaid, the successful applicant, about his *own* family's amenability to his working at night (Tr. 66).

4. Josiah Butler testified that questions concerning willingness to work at night were asked, by the selection committee, of *both* the plaintiff and the successful applicant, Kincaid (Tr. 101).

5. Eugene Nichols confirmed that the night work question or questions were asked of all applicants (Tr. 119).

In sum, there is no evidence to support that propositions that (1) this line of inquiry by the selection committee was

not job related, or (2) that the plaintiff was subjected disparately to this selection criterion. This finding is a touchstone to this case, since it is the only purported evidence of disparate treatment of the plaintiff. Permitting it in the findings and conclusions would not only be an *ipse dixit;* in fact, it is directly contradicted by the record.

IV. Kincaid's Physical Education Degree as a Major Selection Criterion

Plantiff's findings and conclusions indicate that defendant's contention "that Kincaid was selected because of his particular degree is not supported by the evidence" (F&C 7). Four of the five members of the selection committee specifically testified that this was their respective primary reason for the selection of Kincaid. Furthermore, to conclude that the degree was not an important credential, for the particular position of municipal recreation director, is to assert, implicitly, that a music degree does not prepare one to be a musician, that an engineering degree does not prepare one to be an engineer. The importance of a college degree for the specific position applied for is patently apparent, and yet the significance of this credential is not addressed in the plaintiff's findings and conclusions.

The draft findings and conclusions emphasize the education of the plaintiff incorrectly both as to factual findings and to the conclusions to be drawn therefrom (F&C 9). She is credited with a bachelor of science in 1963 or 1964 from Sacred Heart College. In fact, she testified that this was an associate degree (Tr. 36). In addition, several sentences are devoted to her other education, including a B.S. in 1973, and other nondegreed course in such matters as government, history, logic, and decoupage (F&C 9).

By contrast, Mr. Kincaid's higher education is dismissed by a single sentence: "Mr. Kincaid's post high school

education as of March 1975 was a B.S. Degree in health and physical education which he received in May 1974 from Appalachian State University (Tr. 9). The preparation for a recreator's position which was entailed in earning that degree was put on the record, but is dismissed with little reference or comment (Tr. 9-13).

In fact, the record paints a vastly different picture of courses completed by Kincaid which are patently and directly related to the job position which is the subject of this litigation:

1. Numerous courses in team sports, including how to teach and evaluate sports (Tr. 70, 83-84).

2. Courses in the teaching of physical education to elementary students (Tr. 72).

3. Courses in education of secondary students, with emphasis on teaching physical education (Tr. 72-73).

4. First aid (Tr. 72).

5. Organizing and administering physical education, including, for physical education facilities specifically, such matters as budgeting, organizing sports leagues and programs, purchasing, insurance, maintenance, and the planning and developing of facilites (Tr. 73).

In addition, Kincaid had specific educational training, as part of his degree program, in assisting and student teaching, in physical education specifically, in Mountain City, Tennessee and Boone, North Carolina (Tr. 73-84). He had also worked, in physical education, with the handicapped (Tr. 87).

VI. The Relative Recreation-Related Experience of the Plaintiff, vis a vis Kincaid

The plaintiff's findings and conclusions indicate that the plaintiff spent "about two years" at Broughton Hospital, "supervising" other employees in recreational activities (F&C 10). Also noted is that the plaintiff had a "basic knowledge" of sports, umpire experience, first aid knowledge, and had participated in, and is interested in, various sports (F&C 12-13). Her alleged "supervisory" experience is addressed, *infra*, at VII. No reference is made to the impeachment of her testimony about recreation experience, which includes, *inter alia*, the following:

1. She in fact had no umpiring training or experience (Tr. 25).

2. She had no experience or training in organizing sports leagues (Tr. 24-25).

3. She had no training or experience in the treatment of athletic injuries (Tr. 25).

4. She had no academic courses in the rules of team sports (Tr. 26).

5. She had no courses in budgeting for sports and recreation program (Tr. 26).

In addition, there is no evidence that she had any educational training whatsoever in physical education at all, other than that covered in her general training to be an elementary teacher. All of this lack of training and experience stands in contrast to that of Mr. Kincaid, and yet is not addressed in plaintiff's findings and conclusions, for the reasons set out in V. above as to formal education, and

as to the following additional matters concerning Kincaid's own experience in sports and recreation:

1. Participation in organized football, from age 10 through high school, on the very playing fields he now supervises (Tr. 74).

2. Five years of organized team basketball, in Bessemer City specifically (Tr. 74).

3. Organized team baseball, from age 6 through age 14 (Tr. 75).

4. Coaching of players aged 8 through 13 in the sport of basketball, again, in Bessemer City specifically (Tr. 75-76).

VII. The Plaintiff's Purported Supervisory Experience in Recreation

Much emphasis is placed on the plaintiff's experience at Broughton Hospital. It must be, to try to prove she had any supervisory experience in recreation activities, to overcome Kincaid's advantages in this field in training and experience. Plaintiff's findings and conclusions indicate she had "about two years" experience at Broughton, "supervising" other employees (F&C 10). Also, it is alleged that plaintiff ". . . was in charge of supervising activities in the Recreation Department of Broughton Hospital from about 1956 through about 1957" (F&C 9).

The record does not bear out these allegations, as to either breadth or duration. Plaintiff's own testimony is that she worked at Broughton "I think about 1956, '57. I'm not sure exactly which *year* it was. It was *one* of those years" (Tr. 15; emphasis supplied).

Further, it is alleged that she "supervised" while at Broughton, but the record clearly implies that her supervsion was of patents, not employees:

"Q. Ms. Anderson, one of the factors you mentioned was your ability to supervise. In what activities have you gained this experience or had you gained this ability prior to 1975?"

"A. Well, in my job at Broughton Hospital, I had to supervise adults there—some young adults but, in particular, older adults,—in various activities" (Tr. 23).

Even if it be assumed, for sake of argument, that she in fact claimed to supervise in an employer-employee sense, she lacked the recognized emoluments of supervisory authority when at Broughton: she had no authority to hire, no authority to discipline, and no authority to discharge (Tr. 34).

In addition, the plaintiff's findings and conclusions fail to indicate the *passage of time* since her purported supervision of recreation at Broughton; this experience, limited as it was, was at least *18 years* prior to her application for the recreation director's job in 1975. It was so far distant in time, in fact, that she could not even remember her job title when employed at Broughton (Tr. 35). This omission of the temporal distance is compounded by the mischaracterization of both her length of employment at Broughton and her duties while there. Kincaid, by contrast, was educated and experienced in recreation up to the very date of his hire.

By contrast, the plaintiff's findings and conclusions indicate that Kincaid had no experience in recreational direction, no supervisory work experience, and virtually no experience in supervision and management (Tr. 10, 11, 14). Given the misrepresentations described above, this if true would establish no contrast between the plaintiff and Kincaid. In fact, the representations of Kincaid's experience in recreation direction and supervision are not accurate, for the reasons set out elsewhere herein.

VIII. Plaintiff's "Professional Certification"

Much ado is made of the plaintiff's "professional certification" as a recreator, and the fact that Kincaid had no such certification at the time he applied for the job of recreation director (F&C 9). In fact, the record indicates, through the plaintiff's own testimony, that no experience was required to become thus certified, that her only purported qualification for the certificate was her time at Broughton Hospital (discussed herein at VII), that no test was required to get the certificate, (or that she does not remember whether a test was required), and that she had no idea whether the certificate was still active (Tr. 23, 36-37). To credit this certification as a job credential, while minimizing the B.S. degree of Kincaid in the specific discipline of the job position, a degree which he had received only one year before and which was supported by a lifetime of sports experience, is patently unjustified, both in terms of the record and of logic.

IX. Lenora Boone's Credibility

The plaintiff's findings and conclusions discredit the male selection committee's clear testimony that they relied on job-related criteria in filling the position at issue. By contrast, Lenora Boone's testimony is fully credited, with no explanation of her biases demonstrated on the record:

1. She testified that she told the plaintiff male applicants were not asked about their families' reactions to working at night, while admitting she herself pursued this subject with Kincaid (Tr. 66).

2. She sought out the plaintiff before the interviews and discussed the position with her (Tr. 54-55).

3. She told Josiah Butler she would not vote to select Kincaid, before the interviews were conducted, because of a bias against Kincaid's family (Tr. 61-62).

4. She indicated her belief that the choice would be between selecting Kincaid or the plaintiff, before the interviews were conducted, according to testimony she did not contradict (Tr. 62).

5. She said Kincaid was her own third choice, despite her prejudice against his family (Tr. 64-65).

6. She told the plaintiff that Kincaid was selected before the job interviews, even though she had been told this by no one on the committee or otherwise (Tr. 57-58). Her sole basis for her alleged belief, and the communication of it to the plaintiff, was "woman's intuition" (Tr. 56).

7. She never testified affirmatively that no male applicants were asked about family reactions to night work (Tr. 48), even though she subsequently told the plaintiff this was the case (F&C 6).

8. She had lost political elections to two of her fellow selection committee members (Tr. 63-64).

In sum, Ms. Boone was not a credible witness, and yet her testimony is not only credited in the plaintiff's findings and conclusions, it is a lynchpin of plaintiff's entire case. The record, for the reasons here set out, will not support such findings and conclusions.

X. Kincaid's Alleged List of Job Duties

Plaintiff's findings and conclusions indicate that Kincaid, the successful applicant, was given a list of his duties

after he was hired (F&C 6, 8). This is to infer that he would not know how to execute his position without guidance. In fact, Kincaid denied knowledge of being given the list, and plaintiff's attorney Wallas indicated that the list, actually, was developed by defendant in response to discovery requests (Tr. 138).

XI. The Roster of Job Applicants

Nowhere in plaintiff's findings and conclusions is reference made to the fact that six males, in addition to the plaintiff and Kincaid, applied for the position. Six males were also rejected for the position in question in this litigation.

City of Bessemer City,
North Carolina

By Philip M. Van Hoy
Philip M. Van Hoy
400 South Tryon Street, Suite 3022
Charlotte, North Carolina 28285
Telephone: (704) 377-5151

By A. C. Blue, III /by P. M. Van Horn
Arthur C. Blue, III
Whitesides, Robinson & Blue
246 West Main Avenue
Gastonia, North Carolina 28053
Telephone: (704) 864-5728

Attorneys for Defendant

December 8, 1982

Plaintiff's Reply to Defendant's Response to Plaintiff's Proposed Findings of Facts and Conclusions of Law

(Filed December 21, 1982)

Plaintiff hereafter replies to Defendant's Response to Plaintiff's Findings of Fact and Conclusions of Law dated December 9, 1982 (hereafter "Defendant's Response"). For convenience, plaintiff's paragraph references below correspond to the paragraphs in Defendant's Response.

I. *Selection Criteria Used by the Committee*

The defendant contends the proposed findings of fact are erroneous in that they assert the selection committee was provided no specific qualifications or standards for the Recreation Director job. The defendant argues that the male members of the committee had certain life experiences in physical education, recreation or government which "qualified (them) to invoke their own knowledge in judging the qualifications (of the applicants)" (Defendant's Response, p. 3). The truth, however, is that the lack of standards permitted the male committee members to use their own *biases* in the selection process which they freely did. See proposed Finding of Fact 18. It is uncontroverted that there were no standards or guidelines for the job. (TT. 46-47, 115, 125). Each committee member exercised his vote based on the particular individual criteria he deemed important (TT. 137). These facts made it easy for the process to be infected by the pre-conceived notions of the committee members.

II. *The Plaintiff's Conversations With Neil Barnes*

The uncontroverted testimony is that Neil Barnes, a City official, told the plaintiff prior to the time the selection committee met that Donald Kincaid had the Recreation Director job "wrapped up". (TT. 5-6). Contrary to

defendant's assertion, plaintiff submits that the evidence is probative in at least two ways. First, the fact that Barnes so advised the plaintiff prior to the time she applied for the Recreation Director job explains why she set forth in her letter of application (PX-10) a request that the selection committee pick the best qualified candidate rather than give "stronger consideration" to males. (TT. 7). Second, the uncontroverted evidence implies that Barnes had talked to male members of the selection committee prior to the interview and learned that they were favoring Kincaid for the position. Although such an inference is possible it is certainly not necessary for plaintiff to prevail given the other evidence of discriminaton. The plaintiff certainly had no obligation to call Barnes as a witness, and the plaintiff's testimony with respect to her conversations with Barnes is uncontroverted and unimpeached.

III. *Interview Questions Asked the Various Applicants*

This court, in paragraph 4(e) of its memorandum of decision filed September 16th, 1982, made a specific finding that certain stereotypical questions (See Proposed Finding of Fact 8) were asked the plaintiff but were not asked the male applicants. The defendant contends that one of three questions, concerning night work, was actually asked of all applicants. The defendant's contention turns on credibility. Plaintiff testified she was asked the three specific questions (TT.8); Mrs. Boone testified plaintiff, and only plaintiff, was asked the questions (TT.48, 65) and, both plaintiff and Mrs. Boone testified that Boone told plaintiff shortly after the interview that only the plaintiff was asked the questions. (TT. 30, 66) Contrary to defendant's assertion (Defendant's response, p.5), Mrs. Boone did not ask Kincaid about night work (TT. 65, line 24 to TT. 66, lines 1, 12, 13, T. 77). While some of the male committee

members did offer contradictory testimony concerning this matter, this credibility issue has been decided by the court. Plaintiff would respectfully suggest that the court indicate in the findings of fact that this specific credibility issue has been fully considered by the court and that, as the court has already indicated, it has been resolved in favour of the plaintiff.

IV. *Kincaid's Degree*

Contrary to defendant's assertion, plaintiff does not contend that Kincaid's degree in physical education was not a credential which the selection committee should properly have reviewed. Plaintiff does contend that the male members of the committee failed to look fairly at all the qualifications of the two candidates. They were influenced by their own biases. The degree could not have been an absolute requirement since Mr. Broadway had no degree and was the first choice of the committee.

The defendant correctly points out that the degree the plaintiff received in 1963 or 1964 was an associate or junior college degree. Plaintiffs have no objection to that correction being made in the findings of fact although what plaintiff has proposed is not misleading. Plaintiff's total education, total work experience and total other experiences were all greater than Kincaid and those facts made her more qualified.

The defendant implies that a degree in physical education is one specifically tailored for a job as Recreation Director. There is no proof to support that contention. Moreover, Kincaid's specific course work was not known to the committee at the time it decided to employ Kincaid (TT. 84, 108), and, therefore, the committee's decision could not have been motivated by those specific subjects.

V. There is no Paragraph V in Defendant's Response.

VI. *The Comparative Experience of Anderson and Kincaid*

The defendant in its response again ignores Ms. Anderson's substantial qualifications. The job in question was not that of a physical education instructor. The Recreation Director position required a number of skills only some of which were directly related to physical education. The plaintiff had experience in umpiring; she had experience in organizing matters which were more complicated than a sports league; she knew first aid and the rules of sports; and she had significantly more experience than the defendant in budgeting for various projects. (TT. 40-43). In contrast, Kincaid had played a number of sports (most of which the plaintiff had also played) and had done some coaching for a few months in a Bessemer City little league. Certainly the defendant does not contend that playing little league baseball is a more important qualification for the diverse duties of Recreation Director than years of teaching experience dealing with all types and ages of people plus the civic and other experience and education which the plaintiff had at the time the Recreation Director was hired.

VII. *The Plaintiff's Supervisory Experience*

The defendant contends that the plaintiff's supervisory experience in the recreation department of Broughton Hospital is not relevant to this Court's decision. The evidence, of course, is that the plaintiff conducted various programs at Broughton Hospital where she planned numerous activities for individuals and, in fact, directed a number of employees. (TT. 15). This experience was certainly more than that possessed by Kincaid. (TT. 91). Plaintiff's proposed finding that Kincaid had absolutely no experience

BEST AVAILABLE COPY

in recreation direction, in supervising employees or anyone else, or in management is uncontroverted. While the defendant states (Defendant's Response, p. 12) that "the representations of Kincaid's experience in recreation direction and supervision are not accurate, for the reasons set out elsewhere herein", plaintiff's counsel have diligently looked "therein" and have yet to find any evidence that Kincaid had ever worked as a supervisor prior to assuming the recreational director position.

VIII. *Plaintiff's Certification as a Recreation Director*

Plaintiff does not make "much ado" about plaintiff's professional certification as a recreator. It does not appear that she was required to complete any rigorous test to obtain the recreation certificate. The certificate however does indicate that she had previous recreation experience, and she met whatever qualifications that were required at the time. Kincaid, on the other hand, had no recreational certification at the time of the interviews.

IX. *Lenora Boone's Credibility*

This Court had ample opportunity to view Ms. Boone and to determine whether her testimony was truthful. Plaintiff submits that she had no personal interest in the litigation and that her testimony was consistent and strong. More specifically:

1. The Court has already indicated that it believes Ms. Boone that only the plaintiff was asked the pertinent stereo-typical questions.

2. She did not seek out the plaintiff before the interview and did not improperly discuss the matter with the plaintiff prior to that time. She did speak to the plaintiff and

others. (TT. 55). It was the male members of the committee who talked to Kincaid about applying for the job (TT. 82) and who solicited applications from Broadway while not soliciting applications from females who were admittedly qualified for the position. (TT. 105).

3. She had no prejudice against Kincaid (TT. 61) and based her decision to vote for Ms. Anderson on all of the qualifications of the candidates. (TT. 49).

4. Boone could not have been influenced by any political elections. At the time the decision in question was made Boone was a member of the city council. Immediately after the interviews, Boone took the position that the selection of Kincaid was tainted by discrimination. Any elections she might have *thereafter* lost would not have influenced an opinion already reached.

X. *The Job Duties Provided Kincaid*

The list of job duties were sent to Kincaid on May 1, 1975 after he was selected for the job (TT. 89, PX 15). It is clear that neither the committee nor Kincaid had such a list prior to the interviews. (TT. 46, 47, 89, 115, 125).

XI. *The Fact That Other Males Were Rejected*

Sometimes defendants feel compelled to have an "Argument XI" and, when and only when they do, they submit two sentence arguments like that found at Defendant's Response, p. 15.

XII. *Conclusion*

For the reasons set forth above, Defendant's Response should be rejected and the proposed findings and conclusions should be adopted.

Plaintiff's Reply to Defendant's Response to Plaintiff's Proposed Findings of Fact and Conclusions of Law

This 20th day of December, 1982.

Respectfully submitted,

Illegible
JONATHAN WALLAS
RONALD L. GIBSON
JOHN T. NOCKLEBY
Chambers, Ferguson, Watt, Wallas, Adkins & Fuller, P.A.
951 South Independence Boulevard
Charlotte, North Carolina 28202
(704) 375-8461

Attorneys for Plaintiff

Findings of Fact and Conclusions of Law

(Filed February 16, 1983)

[The Findings of Fact and Conclusions of Law appear at pp. 6a-32a of the Petition]

Judgment

(Filed February 16, 1983)

[The Judgment appears at pp. 33a-34a of the Petition]

Notice of Appeal

(Filed March 10, 1983)

Notice is hereby given that the City of Bessemer City, North Carolina, defendant named above, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the Final Judgment and from the Order Awarding Attorney's Fees entered in this action on the 16th day of February, 1983.

This the 10th day of March, 1983.

/s/ P. M. VAN HOY
Philip M. Van Hoy
400 South Tryon Street, Suite 3022
Charlotte, North Carolina 28285
Telephone: (704) 377-5151

/s/ A. C. BLUE by P. M. VAN HOY
Arthur C. Blue, III
Whitesides, Robinson & Blue
246 West Main Avenue
Gastonia, North Carolina 28053
Telephone: (704) 864-5728

Attorneys for Defendant

Plaintiff's Exhibit No. 8

(Duties of Recreation Director)

(Seal)

CITY OF BESSEMER CITY

132 W. VIRGINIA AVE.
BESSEMER CITY, N. C. 28016

PHONE: 704/629-2235

The duties of the recreation director of Bessemer City will endeavor to develop a well rounded recreation program for the use and benefit of the citizens of Bessemer City. The duties are expected to encompass and include, but not limited to, the following:

1) To manage all recreation facilities in the City of Bessemer City.

2) To develop recreation programs to serve the needs of all age groups and both sexes.

3) Organize a program of competitive sports in a comprehensive program.

4) Manage the Bessemer City Community Centers.

5) Direct the operations of the swimming facilities.

6) Develop facilities and planning and proposed methods of financing the plans for improvement in addition to the city recreation facilities.

7) Perform other related duties as may be assigned by the City Manager.

8) The Recreation Director is under direct supervision and control of the City Manager and is expected to work together with, and receive advice from the Bessemer City recreation committee.

9) The Recreation Director is hereby delegated the authority to hire and fire all employees in the recreation department.

Plaintiff's Exhibit No. 10

(Resume of Phyllis Ann Anderson)

March 16, 1975

Mr. William E. Metcalf
City Manager
Bessemer City, N.C.

Dear Mr. Metcalf:

It is my understanding that your office is accepting applications for the position of City Recreation Director.

Please review the enclosed resume which outlines my qualifications for this position.

In addition to those qualifications outlined in the resume, I am a permanent resident of Bessemer City and am quite familiar with the people of this area. Further, I am available immediately for interview or employment.

I realize you will probably be giving stronger consideration for a male to fill this position. In this light, I would request that you review all qualifications equally, realizing women are assuming positions off leadership and responsibility in industry and government equal to those held by men.

Thanking you for every consideration, I remain,

Very truly yours,

/s/ PHYLLIS ANN ANDERSON

Plaintiff's Exhibit No. 10

PHYLLIS ANN ANDERSON

PERSONAL HISTORY:

Born, Bessemer City, N.C., July 27, 1935
Married May 16, 1954 to Jim E. Anderson
Children: Jimmy, 15, Scott, 10
Residence: 301 West Virginia Ave., Bessemer City, N.C., Telephone: 629-4669
Husband's Employment: Southern Homes Real Estate & Construction Co., 720 Gastonia Highway, Bessemer City, N.C.

EDUCATIONAL HISTORY:

Bessemer City Elementary School
Morganton High School, 1953
Sacred Heart Junior College—AS Degree 1964
Sacred Heart College—BA—1973
Gaston College—Government & History Courses—1973
Decoupage Course—1974
Belmont Abbey College—Logic & Guidance Courses—1964
N. C. State *Regional Director Certification*—1957
Dale Carneige Course—1969

EDUCATIONAL AWARDS AND ACTIVITIES:

Morganton High School Band—4 yrs
Miss Band—1953
Majorette 2 yrs
Historian, Homemaker Club
Basketball, 2 yrs
Glee Club

CIVIC ACTIVITIES:

Exchanette Club, Kingsport, Tenn., 1967-'69
Organized New Exchangette Club

Plaintiff's Exhibit No. 10

Served as President, Vice President, Chairwoman of all committees
Elected Exchangette of the Year for State of Tennessee, 1969
Judge, Junior Miss Pageant, 1968
Jaycette Club, Bessemer City, 1970-73
Rookie of the Year, Jaycette Club, 1970
Bessemer City Order of the Eastern Star—1970-'75
Associate Matron, Order of Eastern Star
Chairman, Beauty Pageant
Officer, Eastern Star, 4 yrs

EMPLOYMENT HISTORY:

Gaston County Public Schools: 10 years substituting all grades. Taught 3rd grade, Carr School, Dallas, N.C., 1973-74

Matthews Belk Co., Gastonia, N.C. Salesperson while attending Sacred Heart College

Broughton Hospital, Morganton, N.C. 2 yrs while husband overseas. Instructed patients in recreation program. Taught sports, dancing, singing, etc.

Broughton Hospital, Morganton, N.C.
Earned N.C. Recreation Director Certificate—1958

Drs. Washburn, Crawley and Harris—Receptionist and Nurse's Aide for 2 years while husband was student as Gardner Webb College

Washington-Lee School, Kingsport, Tenn. 1967-1970

EMPLOYMENT REFERENCES:

Mr. John L. Cudd, Carr School, Dallas, N.C.
Mr. Robert Falls, Assistant Superintendent, Gaston County Public Schools

Plaintiff's Exhibit No. 10

Mr. Harry Stallard, Washington-Lee School, Kingsport, Tennessee

Mrs. Lou Noblett, Gaston County Public Schools
Dr. Wyan Washburn, Royster Clinic, Boiling Springs, N.C.

PERSONAL REFERENCES:

Mr. A. A. Bailey, Bessemer City, N.C.
Mrs. Frances Garrett, Bessemer City, N.C.
Mr. Roosevelt Parks, Gastonia, N.C.
Miss Miriam Eury, Bessemer City, N.C.
Mrs. Joyce O'Brien, Bessemer City, N.C.

MISCELLANEOUS:

Can operate most office machines
Play piano, music director
Basic knowledge of all sports
Enjoy all indoor and outdoor sports
I am in good health

Plaintiff's Exhibit No. 11

(Resume of Donald F. Kincaid)

P.O. Box 391
Bessemer City, N.C.
March 17, 1975

Mr. William Metcalf
City Manager
Bessemer City, N.C. 28016

Dear Mr. Metcalf:

I am interested in the position of Recreation Director for the Town of Bessemer City. I would like to apply for this position.

I am a 1974 graduate of Appalachian State University, with a B.S. degree in Health and Physical Education. I have always participated in sports and recreation, and have a very strong desire to have a career in sports and recreation.

My credentials are available at Appalachian Office of Placement. Please send me an application form. I am available for a personal interview at your convenience. My telephone number is 435-5731, and my mailing address is P.O. Box 391, Bessemer City, N.C. 28016.

Sincerely,

Donald F. Kincaid

Plaintiff's Exhibit No. 11

DONALD F. KINCAID

MAILING ADDRESS:

P.O. Box 391
Bessemer City, N.C.
Telephone: 435-5731

OBJECTIVE:

To organize a Recreation Program for the people of Bessemer City, that they will enjoy, benefit from, and be proud of.

EDUCATION:

Appalachian State University, Boone, N.C. 1971-1974
B.S. Health and Physical Education

METHOD AND ACTIVITY COURSES:

Basketball, football, baseball, volleyball, track, soccer, swimming, tennis, skiing, badminton, golf, participated in ASU Intermureal program.

OTHER INTEREST:

Coaching, reading, music

EXPERIENCE:
HIGHLIGHT:

Winter 1973-1974 Student teaching at Mountain City, High School, Tenn.

1974-1975 Commercial Credit Corp. Working in the finance department. Experience in working with the public.

Plaintiff's Exhibit No. 12
(EEOC Charge and Notice of Right to Sue)

EEOC CHARGE
[Excerpts]

Explain what unfair thing was done to you and how other persons were treated differently. Understanding that this statement is for the use of the United States Equal Employment Opportunity Commission, I hereby certify:

I was not hired for the position of Recreation Director for the City of Bessemer City because of my sex (female).

• • •

On March 1, 1975, I submitted an application to the City Manager of Bessemer City for the position of Recreation Director. I was interviewed on March 25, 1975 by four male members of the recreation committee and one councilwoman. During my interview, I was asked questions about what kind of program I would have and how I felt about working with organizations outside the City. I was asked if I knew that there was night work involved and how my husband felt about me applying for the job. I was also asked if I felt I could handle any situation that might come up. I have previously worked for two years as a recreation therapist at Broughton Hospital. Over a period of twenty years I have been involved in numerous civic and community affairs. (Copy of resume atttached). The day following my interview (3/26/75), I called Ms. Audie Boone, who was the councilwoman present at my interview. In so many words, she informed me that in spite of her vote, I was not selected for the position because of my sex (female). Donnie Kincaid, who will be graduating from college this term, was awarded the job. It has been vacant since the 14th or 15th of March, 1975. Although I was told that the position was available on April 1, 1975, the City is holding the job until Donnie gets out of college. I feel that I was not hired to fill this position because of my sex (Female).

Plaintiff's Exhibit No. 12

(Seal) U.S. Department of Justice

JPT:SP:mb
DJ 170-55-59

Washington, D.C. 20530

FEB 19 1981

NOTICE OF RIGHT TO SUE
WITHIN 90 DAYS

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Phyllis Anderson
301 West Virginia Avenue
Bessemer City, North Carolina 28016

Re: Phyllis Anderson v. City of
Bessemer City; EEOC No. 045751171

Dear Ms. Anderson:

The Civil Rights Division has completely reviewed the file referred to us by the Equal Employment Opportunity Commission (EEOC) in its investigation of your charge of discrimination, and it has been determined that we will not file suit in this particular matter against the respondent. This should not be taken to mean that the Department of Justice has made a judgment as to whether or not your charge is meritorious.

You are hereby notified that conciliation on your case was unsuccessful by the EEOC. You are further notified that you have the right to institute a civil action under Title VII of the Civil Rights Act of 1964, as amended, 41 U.S.C. 2000e, *et seq.*, against the above-named respondent. If you choose to commence a civil action, such *suit must be filed in the appropriate United States District Court within 90 days of your receipt of this Notice.*

Plaintiff's Exhibit No. 12

Therefore, you should consult an attorney of your own choosing at your earliest convenience. If you are unable to locate an attorney, you may wish to contact the EEOC, or apply to the appropriate Federal district court, since that court may appoint an attorney in appropriate circumstances.

We are returning the files in this matter to EEOC's district office. If you or your attorney have any questions concerning this matter or wish to inspect the investigative file, please feel free to contact the EEOC office listed below.

Ms. Anderson
District Director
Charlotte District Office
Equal Employment Opportunity Commission
403 North Tryon Street, 2nd Floor
Charlotte, North Carolina 28202

Sincerely,

James P. Turner
Acting Assistant Attorney General
Civil Rights Division

/s/ SQUIRE PADGETT
Squire Padgett
Attorney
Federal Enforcement Section

Plaintiff's Exhibit No. 13

(Determination by EEOC)

(Seal)

Charlotte District Office
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
411 N. Tryon Street
Charlotte, North Carolina 28202

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Charge Number: 045751171

Ms Phyllis Anderson
301 West Virginia Avenue
Bessemer City, North Carolina 28016 Charging Party

City of Bessemer City
132 West Virginia Avenue
Bessemer City, North Carolina 28016 Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue on behalf of the Commission, the following determination as to the merits of the subject charge.

Respondent is an employer within the meaning of Title VII, and the timeliness and all other jurisdictional requirements have been met.

Charging Party alleges that Respondent failed to hire her as a Recreation Director for the city of Bessemer City, North Carolina because of her sex, female.

Respondent denies the allegation.

Respondent states that it selected the best qualified applicant, a male. Respondent submitted a list of duties that the potential Recreation Director was to perform.

Plaintiff's Exhibit No. 13

Evidence obtained by the Commission reveals that the successful applicant, a male, possessed a B.S. Degree in Health and Physical Education. His previous work experience was working with a finance corporation.

Evidence obtained by the Commission reveals that Charging Party, a female, possessed an A.S. Degree in Social Studies and a B.S. Degree in Education. Her previous work experience included recreation director experience in a hospital setting and public school teacher. Charging Party is a certified Recreation Director and has been actively involved in other civic and community sports activities, and her musical ability. However, the Charging Party was not hired.

Based on evidence submitted to the Commission, it is evident that Respondent failed to select the best qualified applicant. The Respondent was invited to explain this discrepancy, but it failed to offer any creditable explanation. In view of these facts, it can be concluded only that the reason for the diafference in treatment of the Charging Party is her sex.

Having determined that there is reasonable cause to believe the charge is true, the Commission now invites the parties to join with it in a collective effort toward a just resolution of this matter. A "Notice of Conciliation Process" is enclosed for your information. A representative of this office will be in contact with each party in the near future to begin the Conciliation process.

On behalf of the Commission:

/s/ JAMES H. TROY
James H. Troy
District Director

Date JUL 14 1980

Enclosure: (1)

Notice of Conciliation Process

Plaintiff's Exhibit No. 14

(March 18, 1975 letter from Mayor Ramsey to Mrs. Boone)

132 W. Virginia Ave.
BESSEMER CITY
NORTH CAROLINA
28016

OFFICE OF THE MAYOR
JAMES C. RAMSEY

March 18, 1975

Mrs. Auddie Boone
505 N. Fourteenth St.
Bessemer City, N. C. 28016

Ref: Recreation Director Hiring Committee

Dear Auddie:

In persuance to hiring a new Recreation Director, I have appointed the following committee, wtih you as Chairwoman.

Please have this committee to convene and interview applicants, and recommend to the City Manager, one applicant for the job, before April 1, 1975.

All salary negotiations will be conducted by the City Manager.

The Committee are:

Mr. Joe Butler
Mr. Tim Helms
Mr. Harold McClellon
Mr. Gene Nichols

All applications received, will be available in the City Manager's office.

Plaintiff's Exhibit No. 14

Do not hesitate to call if I can be of any assistance.

Sincerely,

/s/ JAMES C. RAMSEY
James C. Ramsey
Mayor

JCR/pst

"The City with a Heart"

Plaintiff's Exhibit No. 15

(May 1, 1975 letter from City Manager to Mr. Kincaid)

City of Bessemer City
132 W. VIRGINIA AVE.
Bessemer City, N. C. 28016

May 1, 1975

Mr. Donny Kincaid
Recreation Director
Community Center
Bessemer City, N. C. 28016

Dear Mr. Kincaid:

The duties of the recreation director of Bessemer City will endeavor to develop a well rounded recreation program for the use and benefit of the citizens of Bessemer City. His duties are expected to encompass and include, but not limited to, the following:

1) To manage all recreation facilities in the City of Bessemer City.

2) To develop recreation programs to serve the needs of all age groups and both sexes.

3) Organize a program of competitive sports in a comprehensive program.

4) Manage the Bessemer City Community Centers.

5) Direct the operations of the swimming facilities.

6) Develop facilities and planning and proposed methods of financing the plans for improvement in addition to the city recreation facilities.

7) Perform other related duties as may be assigned by the City Manager.

Plaintiff's Exhibit No. 15

8) The Recreation Director is under direct supervision and control of the City Manager and is expected to work together with, and receive advise from the Bessemer City recreation committee.

9) The Recreation Director is hereby delegated the authority to hire and fire all employees in the recreation department.

Yours truly,

/s/ WM. E. METCALF
Wm. E. Metcalf
City Manager

WEM/ltw

Plaintiff's Exhibit No. 18

(Resume of Burt Broadway)

March 18, 1975

Dear Mr. Metcalf,

The resume I enclose for your convenience outlines all the details of my experience. My leadership and administrative ability can be judged from my present duties.

Although I am not completely happy in my present job, the people of Cramerton are fully satisfied with my work. I feel that I am ready to assume full responsibilities of another City such as Bessemer City.

I would also like to thank you for interviewing me. If you need any further information please contact me at your convenience.

Sincerely yours,

/s/ Bert Broodway

Plaintiff's Exhibit No. 18

Experience, Training, and Sensitivity Qualifications

WILLIAM B. BROADWAY

Playground and Recreation Director
536 Brooklyn Street, Cramerton, N. C. 28032 Tel. 824-9754

Personal Details

Born: November 6, 1950 — *Place of Birth:* Charlotte
Health: Excellent — *Marital Status:* Married
Height: 6 Ft. 2 In. — *Dependents:* One
Weight: 200 Pounds — *Profession:* Recreation Director

Objective:

To serve as a full time director of Parks and Recreation in Bessemer City.

Summary:

Professional Director in the Town of Cramerton: Two years of experience in recreation; capable of organizing programs tailored to Bessemer City not only in athletics but other programs, also; full knowledge of equipment, games, and recreation in general.

Experience

Present Full-Time Position:

Licensed, Recreator in the State of North Carolina. Duties include being pool supervisor, program instructor, and Ball field director; plus maintaining recreation building and activities therein. 1973-Present.

Military Experience:

Never served in any form of Military Service.

Recreational Experience:

Coached Optimist Football, Baseball and Basketball for two years. Ran Optimist Saturday Morning League in 1973.

Plaintiff's Exhibit No. 18

Education

Attended Appalachian State University and Gaston College. Took five electives in Physical Education.

References

Will be furnished on request.

[1]

Transcript of Proceedings, September 13, 1982

INDEX

WITNESSES:

		D	C	RD
Plaintiff—				
1.	Phyllis Anderson	4	24	40
2.	Leona Boone	43	53	
Defendant—				
1.	Donald Kincaid	69	81	
2.	Josiah Butler	91	103	
3.	William H. McClellan	110	113	115
4.	Frank Nichols	116	121	
5.	Timothy Helms	126	134	

EXHIBITS:

		Page
Plaintiff—		
3.	Deposition of Frank Nichols	123
8.	Duties of Recreation Director (Exhibit A)	90
10.	Resumé of Phyllis Anderson	6
11.	Resumé of Donald F. Kincaid	51
12.	EEOC Charge and Notice of Right to Sue	10
13.	Determination by EEOC	11
14.	March 18, 1975, letter from Mayor Ramsey to Ms. Boone	46
15.	May 1, 1975, letter from City Manager to Mr. Kincaid	89
16.	Plaintiff's Wage and Tax Statements, (W-2) 1975-81	24
17.	Summary of Earnings of Plaintiff and Mr. Kincaid	24
19.	Letter from Mr. Broadway to Mr. Metcalf with Resumé attached	114

[2] APPEARANCES:

Plaintiff—

Ronald L. Gibson, Esquire
Attorney at Law
Charlotte, North Carolina

Jonathan Wallas, Esquire
Attorney at Law
Charlotte, North Carolina

Defendant—

Philip M. Van Hoy, Esquire
Attorney at Law
Charlotte, North Carolina

Henry Whitesides, Esquire
Attorney at Law
Gastonia, North Carolina

Arthur C. Blue, III, Esquire
Attorney at Law
Gastonia, North Carolina

This matter came on to be heard and was heard at Charlotte, North Carolina, on September 13, 1982, before the Honorable James B. McMillan, Judge, sitting without a jury, and the following proceedings were had, to wit:

Court: Do we have a quorum for Anderson against Bessemer City?

Mr. Gibson: Yes, Your Honor.

Court: You want to make opening statements?

Mr. Gibson: The plaintiff would like to make a brief opening statement.

Mr. Van Hoy: That would be fine, Your Honor.

Court: What is brief?

[3] Mr. Gibson: About thirty seconds.

Court: That is brief enough.

Mr. Gibson: That is a plain and simple disparate treatment case under the McDonnell-Douglas and Burdine cases. We intend to prove that the plaintiff was qualified for the job, that she applied and that she was rejected under circumstances that give rise to an inference of discrimination and that the reasons that the defendant City has come forth with are simply pretextual and that the plaintiff should prevail and should get all the remedies she is entitled to under Title VII. If I talk a whole lot longer, I'll talk longer than it will take to put on the evidence.

Mr. Van Hoy: Your Honor, the defense concurs that this is a simple disparate treatment case involving Burdine and McDonnell-Douglas v. Greene standards. The plaintiff applied for a position as Recreational Director for Bessemer City in 1975 and was one of the eight applicants —the only female—who applied, didn't get the job, believes she had been discriminated against on account of sex, filed an EEOC charge, subsequently brought this action. We will show that the City used job related qualifications which indicated very clearly in the final analysis that the person who got the position—the male who got the position and still occupies it—is at least as well qualified as the plaintiff; furthermore, there is no direct evidence of sex discrimination through anyone's statements or inferences. [4] The plaintiff can probably carry the burden of proof by showing she was qualified for the position but will not be able to show that she was better qualified than the person who filled the position or that there was any direct evidence of discrimination.

Court: All right. You may call your first witness.

Mr. Gibson: We call Ms. Phyllis Anderson, the plaintiff. I believe, Your Honor, pursuant to the pretrial order, counsel for the parties have exchanged exhibit lists and

we stipulate to the authenticity of each others exhibits as shown on the lists.

Mr. Van Hoy: We so stipulate.

Court: If there are any special rulings that ought to be made on any of the exhibits, let me know when you get to them. Okay.

PHYLLIS ANN ANDERSON, the plaintiff, having first been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Gibson:

Q. Would you state your name and address, please? A. My name is Phyllis Ann Anderson. I live at 301 West Virginia Avenue, Bessemer City, North Carolina.

Q. Are you presently employed, Ms. Anderson? A. Yes, I am. I'm employed at St. Michaels Elementary School, Gastonia, North Carolina.

[5] Q. How long have you been employed at St. Michaels? A. About seven years.

Q. Would you describe your duties at St. Michaels? A. I'm a 5th grade teacher, and I teach various subjects, such as spelling, reading, English, math, social studies, physical education, science, music and art.

Q. Ms. Anderson, did you apply for the position of Recreational Director for Bessemer City in March of 1975? A. Yes, I did.

Q. How did you come to be aware of this position? A. I first found out about it through the Gastonia Gazette and, as I was downtown one day shopping, I ran into Ms. Boone, Ms. Auddie Boone, and I realized she was on the City Council: therefore, I asked Ms. Boone if anyone could apply for the job, and she stated that they could.

Q. Now, you mentioned the Gastonia Gazette. What is that? A. It's the Gaston newspaper.

Q. Did you talk with anyone else before making any kind of application for the job? A. Yes, sir. After I decided that I wanted to apply for the job, I went over to where my husband was remodeling a home for Mr. Neil Barnes; and, in the conversation to my husband and Mr. Barnes, I stated that I would like to apply for the Recreational Director's job, and Mr. Barnes was the Superintendent of Water Works then, and he stated that the job was pretty well wrapped [6] up because Donnie Kincaid was —had already been more or less accepted from the committee and . . .

Court: Was Mr. Barnes on the committee?

A. No, sir. He also stated that he was from one of the older families in Bessemer City and that he didn't see any sense of me applying for the job.

Q. Did you apply for the job, Ms. Anderson? A. Yes.

Mr. Gibson: May I approach the witness, Your Honor?

Court: You certainly may.

Q. Ms. Anderson, I hand you what's been marked as Plaintiff's Exhibit 10 and ask you if it's a letter and resume you submitted to the City to apply for the job. A. Yes.

Court: Now, when he said that he, was he talking about Barnes or Kincaid?

A. What are you referring to?

Court: You made a statement awhile ago that Mr. Barnes told you that Kincaid had it wrapped up, and then you said he said he was from one of the

older families of Gaston County. Who was he talking abut, himself or Mr. Kincaid?

A. Mr. Barnes was referring to Mr. Kincaid.

Q. What did you do to apply for the job, Ms. Anderson? A. I wrote a letter to Mr. Metcalf, who happened to be the City Manager at that time.

[7] Q. I want to direct your attention to the next to the last paragraph in your letter, which would be Paragraph 4, and ask you why did you include this paragraph in your letter. A. Well, after speaking with Mr. Barnes, I felt like—that since women at that time were striving to get better jobs, I felt like that I needed to say this to Mr. Metcalf because I felt like that women were having a horrible time getting higher positions at that time.

Q. Did the comments from Mr. Barnes influence your decision to put this in your letter in any way? A. I think so.

Q. Now, what happened after you submitted a letter to the City?

Mr. Van Hoy: Objection. The question is too broad.

Court: Overruled.

Q. Go ahead and answer. A. I was contacted by Mr. Metcalf to come in for an interview.

Q. Ms. Anderson, would you look at your resumé which is attached to your letter? Is this your resumé that you sent in, and is this the way it appeared in 1975? A. Yes, sir.

Q. What happened after you submitted the resumé? A. Mr. Metcalf contacted me to come in for an interview.

Q. Did you go for an interview? A. Yes, sir. I went to the City Hall, and I went before the interviewing committee of five people.

[8] Q. Do you remember who was on that committee? A. Ms. Auddie Boone was the Chairman, Mr. Helms, Mr. McClellan and Mr. Butler and Mr. Nichols.

Q. Would you describe what happened during your interview? A. Ms. Boone opened with the statement—asked me my name, and after that various committee members began asking me questions.

Q. Do you remember what kind of questions you were asked? A. Okay, one was—the first one was if I became the Recreational Director what kind of programs would I put into recreation, and I stated the first thing I would do would be open the doors of the building from 9 o'clock in the morning until 10 at night to keep the young people off the streets, that I would put in programs such as football, ping-pong, tennis, golf—this sort of activity for the young people—and that I would put in programs for the senior citizens such as crafts, taking them on trips, various activities for them according to what their needs would be.

Q. Were you asked any follow-up questions by the committee? A. Yes. They asked me questions such as did I realize there would be night work, was I aware of possibly traveling throughout the county and meeting with the other Directors, did I feel capable of doing that, and then the other question that they asked me was how my husband felt about me applying for the job.

Q. Do you remember any other questions that you were asked during your interview? [9] A. No, sir.

Q. What happened after your interview? A. After the interview, I went home and a couple of days later received a letter from Mr. Metcalf stating that another applicant had been selected for the job.

Q. Did you later learn who that was? A. Yes, sir. It was Don Kincaid.

Q. What did you do after this? A. Well, I felt like that—I was very upset about it, so I immediately went

over to where my husband was working at Mr. Barnes' house and had another discussion with him about it.

Mr. Whitesides: Excuse me. With him, is it the husband or Mr. Barnes?

A. I went to Mr. Barnes' house and had a discussion with my husband about it.

Q. What else did you do? A. I discussed the situation, and Mr. Barnes happened to be there, and we were discussing it again, and he stated that I—Mr. Barnes stated that he had told me Mr. Kincaid had the job wrapped up before I applied. So I was talking to my husband about going to the EEOC, and then after that I was downtown in Bessemer City, and I went into Ms. Boone's business, and I just happened to mention to her that I was disappointed about not getting the job; and she, in turn, began discussing with me just a few things, that she felt like that I was the most qualified person [10] and that she did not feel like the committee had looked at the total qualifications of all the applicants.

Q. If we can back up for a moment, Ms. Anderson, what kind of work was your husband doing at Mr. Barnes' house? A. Construction—he was remodeling his home.

Q. And you mentioned Ms. Boone's place of business. Who is Ms. Boone? A. Ms. Auddie Boone at that time was on the City Council of Bessemer City.

Q. Was she also—is this the same Ms. Boone who was a member of the committee? A. Yes.

Q. What kind of business does she have downtown? Do you remember? A. Clothing store.

Q. Do you remember the name of it? A. No, sir.

Q. What did you do next, Ms. Anderson? A. I called the EEOC, set up an appointment to see them and, in turn, filed a complaint against the City for discriminaton.

Q. Ms. Anderson, I show you what has been marked as

Plaintiff's Exhibit 12 and ask you if that is the Charge of Discrimination you filed with the EEOC. A. Yes, sir.

Q. Would you turn the page over? Does it also include the [11] Right to Sue issued by the EEOC? A. Yes .

Q. Did the EEOC issue a determination in your case?

Mr. Van Hoy: Objection. This is a de novo proceeding not related to the outcome of that administration proceeding.

Court: The decision of the EEOC is not evidence and is not binding on the Court.

Mr. Wallas: I have authority that says it is within your discretion to admit that. The Fifth Circuit seems to imply that it's virtually mandatory to admit . . .

Court: I haven't finished my ruling. It's not binding on the Court. It's not evidence on which I can base a finding but I will receive it for any relevancy it may have. That's what I did in the last case on the subject this morning. That's the same ruling.

Q. Ms. Anderson, did the EEOC issue a determination in your case? A. Yes.

Q. I hand you what has been marked Plaintiff's Exhibit 13 and ask you if that is the determination that you received from the EEOC. A. Yes, it is.

Mr. Gibson: We move to admit Plaintiff's Exhibit 10, 12 and 13 at this time.

Court: With the qualification I just made on Exhibit 13, [12] they are both admitted.

Q. What did you do next, Ms. Anderson? A. I beg your pardon?

Q. What did you do next after the EEOC issued their determination? A. I decided to pursue the suit and got a lawyer.

Q. Do you believe that you were better qualified than Mr. Kincaid for this position? A. Yes, sir.

Q. Would you explain why you believe you were better qualified? A. Well, I feel like I had the leadership, and I had the ability to supervise in this capacity, as well as the education. I also feel like that I had the experience.

Q. Ms. Anderson, I want to direct your attention to your resumé.

Court: Can I find out when this claim was filed? It doesn't appear on the face of it.

Mr. Gibson: Of the charge, Your Honor?

Court: Yes.

Mr. Gibson: On the bottom left corner of Plaintiff's Exhibit 12, it says March 31, 1975.

Court: That's the time it was sworn to, but you have been testifying about things that happened sometime in 1975. You want to tell us what part of the year some of these things occurred? When was the job filled?

[13] A. Your Honor, I'm not sure, about two or three months after that.

Court: Well, your application bears the date of March 16, 1975, and the date on which this charge apparently was sworn to before an EEOC representative is March 31, 1975. Do you know when you, in fact, filed the charge?

A. Within the week after I was interviewed. I think I was interviewed around the 24th of March, 1975.

Court: Is there any evidence as to when the charge was filed? I don't know that any question has been raised about it but the only evidence yet as to

when it was filed is some unnecessary inferences from papers that don't have any official stamp on them.

Mr. Gibson: Your Honor, may I ask her a couple of questions? I think I can clear it up.

Court: All right.

Q. Ms. Anderson, I want to direct your attention back to Plaintiff's Exhibit 12, and in the bottom left corner appears the following: Subscribed and sworn to before this EEOC representative, date—would you read that? A. March 31, 1975.

Q. What's the name of the person appearing under the signature and title? A. Patricia B. Monroe, Junior Technician.

Q. In terms of the order of the way things went, did you apply [14] for the job sometime in March? A. Yes, sir.

Q. And how long after that were you interviewed? A. I'm not sure, within a couple of days.

Q. Okay, then you filed an EEOC charge how long after that?

Mr. Van Hoy: Objection.

Court: Overruled.

Q. Do you remember approximately how long after you were interviewed that you went and filed the charge? A. Within the week.

Q. So, did you file this charge on March 31, 1975? A. Yes.

Q. And also on the bottom left corner of the first page, is that your signature? A. Yes, it is.

Q. And the date next to your signature is . . . A. March 31, 1975.

Court: And so five years later the EEOC filed a determination. Go ahead.

Q. Ms. Anderson, I beileve I was asking you to explain why you believe you were better qualified than Mr. Kincaid. One of the things you listed was your experience. I want to direct your attention to your resumé. Do you have that in front of you? A. Yes.

Q. Would you, by looking at your resumé, describe the jobs you [15] have held and what were some of the duties you had in some of those jobs? A. I worked for Broughton Hospital in the Recreation Department there.

Q. When was this? Try to put some time frame on each one. A. I think about 1956, '57. I'm not sure exactly which year it was. It was one of those years. I worked in the Recreation Department there.

Court: Did you say '56 or '66?

A. '56 and '57.

Q. Would you describe what your duties were at Broughton Hospital? A. Yes, sir. I was in charge of patients there. I was in charge of supervising activities inside the wards and also outside the wards. We had to direct other employees that worked in the Recreation Department in some areas that they did not know how to do. I also planned dances, helped supervise in ballgames, croquet, various activities like that.

Q. On the second page of your resumé, it refers to some time as a receptionist and nurse's aide. When did you work for Doctors Washburn, Crawley and Harris? A. 1958.

Q. So, your work experience started in approximately 1956? A. Let's go back through that just a minute. I'm trying to think. I think it was around 1959 that I worked for Doctors [16] Washburn, Crawley and Harris.

Q. What did you do while working for the doctors? A. I was a receptionist, assisted the doctors at times and also did the bookkeeping.

Q. Did you have contact with the public in that job? A. Yes, sir.

Q. Were you responsible for handling funds, money as part of your bookkeeping duties? A. Yes, I was.

Q. Now, back to Page 1 of your resumé, it says here salesperson while attending Sacred Heart College. Would that have been 19—when was that, Ms. Anderson? A. I graduated in—'61 to '63 I attended Sacred Heart College and also worked at Belk during that time.

Q. Was this part-time or full-time? A. Part-time.

Q. What were your duties at Belk? A. I was a salesclerk, and I also had to run a cash register.

Q. That involved working with the public? A. Yes.

Q. Now, up at the first entry under Employment History on Page 1 of your resumé, it refers to Gaston County Public Schools. Would you describe your duties there? A. I had substituted over a period of about ten years, and in 1973 I received my elementary degree, and I got a position as a [17] third grade teacher at that time.

Q. As best you can remember, would you describe your duties as third grade teacher? A. I basically taught third grade, all subjects. I had to plan activities inside and outside the school, as well as taught my own PE, music and art.

Q. One of the other factors you mentioned was your leadership ability. I want to direct your attention to the section on your resumé entitled Civic Activities and ask you to describe what you were involved with with the Exchangette Club. A. The Exchangette Club is an auxiliary of the men's Exchange Club there in Kingsport, Tennessee. They basically raise the money to help the crippled children. The Exchangette Club helped in that chapter in various ways of raising money and then going with them on trips with the crippled children and just helping them out.

Q. Were you ever an officer of the Exchangette Club? A. Yes, I was the president.

BEST AVAILABLE COPY

Q. What kind of responsibilities did you have as president? A. Well, I was in charge of the meetings. I also was on the—excuse me. I'm trying to think. A pageant—we also sponsored a Junior Miss Pageant, and I was also on that committee to be a judge.

Q. Did your duties or responsibilities with the Exchangette Club [18] include organizing activities, social functions and that sort of thing for the club? A. Yes.

Q. Your resumé also shows that you were involved with the Bessemer City Order of the Eastern Star from 1970 to 1975. Would you describe what was involved with that organization? A. Well, that's basically a religious organization, and we help other people that are in the order if they are in need of something.

Q. You also show you were an Associate Matron. Is that an officer? A. That is an office with Eastern Star.

Q. Did you have any extra duties while holding that office? A. No, I did not.

Q. Now, as a part of your duties as a teacher, Ms. Anderson, were you involved with collecting money for lunch and being accountable for that? A. Yes, sir. I have to do that every morning, and also I'm in charge of planning activities, trips, where money is involved, and I collect that, also.

[19] Q. You mentioned earlier that you were responsible for PE. Are you referring to the physical education part of their training? A. In my room, right.

Q. Would you describe what is involved with your being responsible for PE for the children? A. As a teacher, I must plan activities for the students and I must see that they have certain skills.

Q. Give us some examples of the kind of things you have to plan and participate with the children in. A. It depends on the season. If it's the season for softball, we play softball, and I would see to it that they have the

bases at certain places and that they know how to swing a bat. If it's basketball, I teach them how to hold the ball and how to throw it.

Q. Ms. Anderson, have you ever played baseball? A. Not baseball. I have softball.

Q. What about basketball? A. Yes, sir.

Q. Have you played soccer? A. I've played at it.

Q. Would you describe what you mean by playing at it? A. Well, I have just gotten out with the children and get them started in kicking the ball, and then after awhile I felt it was getting too rough for me, so I kind of get out and I supervise.

[20] Q. Was that part of your duties as a teacher? A. Yes.

Q. Did you have involvement with the PTA as part of your duties as a teacher? A. Yes, I do.

Q. I'm referring both to before 1975 and after 1975. A. I am in it completely.

Q. Ms. Anderson, do you have any children? A. Yes, I have two boys.

Q. What are their present ages? A. 23 and 18.

Q. So, during 1975, they would have been roughly 11 and 15? A. Right.

Q. Or 16. Did you have any involvement with them during that time with sports? A. Oh, yes. I followed my older son through football, and I've followed my younger son since he was about 7 through baseball until now.

Q. Were they involved in baseball and football during 1975 and the years immediately preceding 1975? A. Yes, uh huh.

Q. When you say you followed them, would you explain what you mean by that? A. Well, I'm a great believer in participating in my children's sports, and I constantly went to their games. I even went to [21] practice a lot of times and, as the years went on, and in baseball in particular, there came a time when my younger son, Scott,

was on the all-star team just about every year, and in one particular time in his life—14, I believe—he had the opportunity to go to the World Series in Alabama; and I, in turn, helped Mr. Butler raise the money to send these boys to Alabama on this big trip.

Q. Who is Mr. Butler? A. Mr. Butler, he is—at that time, he had something to do—he was with the Optimists, and he also was on the interviewing committee for the Recreational Director's job.

Q. Ms. Anderson, directing your attention back to your resumé under the Educational History, would you just briefly go through your training that you had in 1975 or leading up to 1975? A. Morganton High Schoo! Band—I was in the band for four years.

Q. And then after Morganton High School? A. I graduated from Morganton High School in 1953.

Q. Did you go on and get some additional training after leaving Morganton High School? A. I took a business course until 1954. That's when I married.

Q. Did you later return to college? A. Yes, sir.

Q. Do you remember what year you returned to college? A. In 1961 I began attending Sacred Heart Junior College. I [22] graduated in 1963.

Court: It says '73 on here. Is that a misprint?

A. Your Honor, I have two degrees. I have one in 1963 and then I have one in 1973.

Q. What was your degree in 1963? A. BS Degree.

Q. In what? A. It was just a BS, Bachelor of Science Degree, Junior College.

Q. In 1973 your degree was in what? A. Elementary Education. I had a BA Degree.

Q. As a part of your courses and training to get your degree in Elementary Education, did that include courses dealing with PE and working with children? A. Oh, yes.

Q. Would you give us some examples of the kind of things that were taught in those courses? A. Well, we had to have health courses for children, and in health we taught them various things they should know and do in health courses, and then also with the PE we had to have the training for putting forth activities and learning how to supervise them.

Q. Your resumé also shows Belmont Abbey College, logic and guidance courses, 1964. Would you describe briefly what was involved with those courses? A. That's been a long time ago and I really don't remember what [23] was involved in the courses.

Q. And also it shows N. C. State Recreational Director's Certificate. Describe briefly what was involved with that certification. A. In order to acquire that, I had to supervise and help the employees put forth the activities at Broughton Hospital.

Q. Ms. Anderson, it also shows on here basketball, two years. Was that in high school or college? A. It was in high school.

Q. You were a basketball player? A. Yes.

Q. Ms. Anderson, one of the factors you mentioned was your ability to supervise. In what activities have you gained this experience or had you gained this ability prior to 1975? A. Well, in my job at Broughton Hospital, I had to supervise adults there—some young adults but, in particular, older adults—in various activities.

Q. And did you supervise in the course of your duties as a teacher? A. Yes. I'm always supervising as a teacher.

Q. Ms. Anderson, since 1975, where have you been employed? A. St. Michaels, Gastonia, North Carolina.

Q. Have you gotten any additional degrees since 1975? A. Yes. I have a degree in Gifted and Talented.

Q. Is that another graduate degree, undergraduate degree or [24] graduate degree? A. It's another undergrad-

uate degree. It's to better the education of the children and to help the children that are more gifted than others.

Q. Is that the only additional degree you have since 1975? A. Yes.

Q. Ms. Anderson, I want to show you what has been marked as Plaintiff's exhibit 16 and ask you if that is a collection of your W-2 Wage and Tax Statements from 1975 through 1981. A. Yes, it is.

Q. And I show you what has been marked as Plaintiff's Exhibit 17. Looking at the first column, does that show your earnings from your Wage and Tax Statements from 1975 through 1981? A. Yes.

Q. For 1982 it shows earnings of $7,504.45. Would you explain—first of all, are those your earnings for 1982? A. Yes, it is.

Q. To the present time?

Mr. Gibson: Those are all the questions we have, Your Honor.

Cross-Examination by Mr. Van Hoy:

Q. Ms. Anderson, have you ever had any training or experience in organizing sports leagues? [25] A. No, sir.

Q. In umpiring? A. No, sir.

Q. In lifeguarding at a swimming pool? A. No, sir.

Q. In first-aid for athletic injuries? A. Are you saying supervise or . . .

Q. Any training or experience in first-aid for athletic injuries? A. No, sir.

Q. Have you ever had any training or experience in public speaking? A. Yes, sir.

Q. Tell me what that experience is. A. Dale Carnegie course—I took a Dale Carnegie course and completed it.

Court: What was the rest of what yo usaid?

A. I don't think I said anything else, Your Honor, and I am always speaking before the public in my classroom, with parents, and at times in home/school meetings I have to get up before the group and speak.

Q. Have you done any public speaking aside from your teaching duties? A. I have with civic organizations.

Q. What are those civic organizations? [26] A. Well, the time that I was with the Exchangette Club I went several places and made speeches.

Q. Have you ever given a public speech about the subject of either recreation or physical education? A. No.

Q. Have you ever recruited officials or umpires for sports events? A. No.

Q. Have you ever been involved in the purchasing of athletic equipment? A. For a total program, sir?

Q. Yes—well, I don't understand what you mean. A. Yes, I have gotten equipment for PE.

Q. Are you talking about your classroom as an educator? A. Uh, huh.

Q. For a formal recreation program, have you ever purchased athletic equipment? A. No.

Q. Have you ever taken an academic course in any of the rules of team sports? A. No.

Q. Have you ever had any experience or training in budgeting for a sports and recreation program? A. No.

Q. Do you know if any of the matters I have asked you about [27] are part of the duties of being the Recreation Director of the City of Bessemer City? A. I was not informed of that.

Q. You don't know whether they are or not. Is that what you're saying? A. That's right.

Q. I would draw your attention again to the letter that you sent as a cover letter, which has already been introduced as a plaintiff's exhibit. You stated in your letter that you did not expect to be hired because you are a female. Isn't that true? A. No, sir, I did not state that.

Q. What did you say?

Court: Let's see what the letter says.

Mr. Van Hoy: I will withdraw that question, Your Honor.

Court: The question of what the letter says is answered by reading the letter.

Mr. aVn Hoy: Yes, it is. I'll withdraw the question.

Q. You testified earlier about an interview before a certain number of persons who constituted a committee that would make the decision as to who to hire. Do you remember that? A. Yes, sir.

Q. Isn't it true, Ms. Anderson, that at the first of your interview that you said you will not hire me because I'm a woman? [28] A. No, sir.

Q. You did not say that? A. No, sir.

Q. You did not say that at any time during your interview? A. No, sir.

Q. Referring to your conversations that you testified on direct examination about with Mr. Neil Barnes, what was Mr. Barnes position with the City at that time, if you know? A. He was Superintendent of Water Works.

Q. Was he on the selection committee that decided who to hire for the Recreation Director's position? A. No, sir.

Q. Did he tell you that he'd had any conversation with a committee member where the committee member told him they would not consider or hire a woman for that position? A. He stated since he worked for the City, he stated that he had heard—he had been told, excuse me, that Mr. Kincaid had already gotten the job but they had to go through the preliminaries of advertising in the paper.

Q. Did he tell you who told him that? A. No, sir.

Q. That's one question—that Donnie Kincaid allegedly already had the job—did he also tell you that the City

would not hire a woman, any woman, for that position? A. No, he didn't tell me that.

[29] Q. So, all he told you was that Donnie Kincaid was going to get the job. That's correct, isn't it? A. Yes.

Q. And you don't know who, if anyone, told him that Donnie Kincaid had the position locked up. A. No, I do not.

Q. You testified about a question from the committee about your husband's reaction to you taking that position if it were offered to you. Who asked you that question? A. It's been seven years ago, sir. I do not remember.

Q. Do you remember exactly what was asked you? A. Yes, sir.

Q. Specifically, what was asked? A. I remember the question was asked how my husband felt about me applying for the job as Recreation Director, and I replied that my husband had nothing to do with me applying for the job; however, he was behind me 100 percent.

Q. You remember that was the words of the question and the words of your answer, or was it something like that? A. No, sir, because I had filed that with the EEOC, so I remember that much about it. The EEOC did not ask me who said it.

Q. You do remember those were the exact words said. Is that your testimony? A. Yes, sir.

Q. I want you to look around the room. All five of the people [30] on the selection committee are here today, are they not? A. Yes, sir.

Q. You remember precisely what was asked you and how you responded but you do not remember who asked you that even though they are here for you to refresh your recollection. Is that your testimony? A. That's right.

Q. When you were interviewed by the committee, were any of the other job applicants present in the room at that time? A. I don't remember. In the room, sir?

Q. Yes, where the interview was conducted. A. No, sir.

Q. Were you present when any of their interviews were conducted? A. No, sir.

Q. Do you know whether any of the applicants were asked what their spouse's reaction would be to their taking the job if it were offered? A. I asked someone if it was said.

Q. Who did you ask? A. I asked Ms. Boone.

Q. Did you ask any of the other individual who were interviewed? A. No, sir, because I didn't see them.

Q. You, of firsthand knowledge, don't know whether they were asked that question or a question like that at all, do you? A. No.

[31] Q. That question about your husband's reaction, if you remember was it asked by more than one committee member, all the committee members, only one? Do you remember? A. I stated in the EEOC report that only one person—it was only asked once.

Q. Asked once by one person. Is that right? A. Yes.

Q. Do you know how many people applied for that position? A. No, sir.

Q. Do you know if there were any other female applicants? A. I was told there was not.

Q. Did anyone on that selection committee tell you that he or she did not consider a female to be qualified for that position? A. No, sir.

Q. Did you hear from anybody else that anyone on the selection committte had made such a statement? A. It was more or less in the conversation from Ms. Boone that I got the impression that Mr. Kincaid had been looked upon to get the job.

Q. I don't believe that's responsive to what I asked. My question was had anyone told you that anyone on the committee had said we will not select a female for this position. A. No.

Q. If you were to find out that everyone who had been interviewed for that position was asked about their spouse's

reaction—if [32] they had a spouse—on night work, travel and so forth, would you still believe that was the basis for sex discrimination?

Mr. Gibson: Objection to the hypothetical question.
Court: Objection's sustained.

Q. At the time of your interview and application for this job, you believed, did you not, that Donnie Kincaid was still in college? A. Yes.

Q. Still an undergraduate in college? A. Yes.

Q. You also believed that the job had been held open for him until he completed college. That's correct, also, isn't it? A. Yes.

Q. Why did you believe that? What was the basis for that belief? A. In the conversation with Ms. Auddie Boone, she also had the impression or led me to believe that they held the job open for him because he had some schooling to finish.

Q. Was that the only source of that belief that he was still in school, what Ms. Boone told you? A. Yes.

Q. At the time you applied, did you know that Mr. Kincaid had a physical education degree? A. No.

Q. You believed that he did not have one, didn't you? [33] A. I guess so.

Q. At the time you filed your EEOC charge, you still did not know he had a physical education degree, did you? A. No.

Q. At the time you filed the lawsuit . . .

Court: What is the pertinance of her beliefs on these matters? If they are facts for the Court to consider, let's get the facts. Her beliefs, I think, are immaterial, aren't they?

Mr. Van Hoy: If she doesn't believe she was discriminated against or believes she was under a false assumption . . .

Court: I believe I'll just start sustaining some objections because these do nothing but take up time. If the facts don't appear, they don't appear, but her beliefs or disbeliefs have nothing to do with whether the action complained of is discriminatory, unless you can tell me a theory why it is.

Mr. Van Hoy: I'll go on.

Q. Your experience in Broughton Hospital that you testified about back in 1956 to '58, you deem that to be the only experience that you have had personality, either through education or through personal experience, in the field of recreation?

Court: Objection sustained for the reasons already stated. Let's get facts instead of beliefs. The Court is going to have to make some determinations about the speculative matters. Their credibility is not involved in the case.

Q. Do you know whether the Recreation Director's position [34] requires night work, work after hours? A. No, I do not.

Q. Did you know at the time you applied in 1975 whether it required night work? A. No, sir.

Q. You spoke about why you believed you were better qualified than Mr. Kincaid on direct examination. In your position as Broughton Hospital, aside from the matters you talked about, did you supervise any employees there? A. Yes.

Q. Did you have authority to fire anyone? A. No.

Q. Did you have authority to hire anyone? A. No.

Q. Did you have authority to discipline an employee for, for example, being late for work? A. No.

Q. Did you supervise and direct the work of other em-

ployees, what they were to do on a particular day? A. Yes.

Q. Tell us about that. How did you supervise other persons? A. Well, I was in charge of the employees, some of them, to direct them on various activities to do on a particular day; or dancing, when we put on a dance program, I had to supervise the employees as to what kind of dancing, how to go about doing it.

[35] What was your job title at Broughton Hospital or titles, if you remember? A. That's been a long time ago, and I don't remember.

Court: Ms. Anderson, I think you'd better talk louder if you want me and the reporter to hear it. It doesn't make any difference if they hear it or not, but I have to heara it to make a decision.

A. I don't remember, Your Honor.

Court: That applies to the next question and answer, also, and all the rest of them you give. Talk loud enough that I can hear.

Q. You referred to the experience of collecting money and raising money in various activities. Is that part of the Recreation Director's job in Bessemer City? A. I don't know.

Q. At the time you applied for this position in 1975, did you have a teacher's certification at that time? A. Yes, I did.

Q. Is that the State certification? A. Yes.

Q. How did you go about getting that certification? A. I attended college, went through a period of training to become a teacher.

Q. Did you have to take a test for that certification? A. Yes.

[36] Q. And you passed that test? A. I did.

Q. If I can draw your attention to the resumé again, under your experience at Sacred Heart College in 1964, the resumé indicates you have an Associate Degree. You testified you had a Bachelor of Sciene Degree as a result of that. Do you know which is correct? A. I had an Associate Science in '64, and then in 1973 I had a BA Degree.

Q. Concerning your recreation certification, did you become qualified for that as a result of this experience at Broughton Hospital? A. Yes.

Q. Was this the experience between 1956 to '58, that era? A. Yes.

Q. Since that time until the time you applied for this job, had you ever been directly related, either through training or experience, in any recreation activities? A. In school and teaching.

Q. Teaching physical education to elementary school children? A. Right.

Q. Aside from that? A. I can't think of any.

Q. Once again, about this recreation certification, can you tell us what the requirements for that were? Did you have to [37] have a certain number of years of experience in recreation? A. No, sir. It's just a matter of being able to work in the capacity of recreation and the duties that were required.

Q. Was there a specific work experience factor? Did you have to be in a recreation position for a certain amount of time? A. Just if you were there within the year and working in the capacity in the recreation program.

Q. You had to be doing it at that time? A. Yes.

Q. But that's all? Did you have to take a test to get that certification? A. No—I don't remember. I really don't remember.

Q. Did that certification run in perpetuity? Did it stay active, or did it have to be renewed every certain number of years? A. It stayed active.

Q. Forever? A. I don't know—I mean after I quit I don't know.

Q. Since 1957-58 when you got that certification, have you done anything to renew it? A. No, sir.

Q. Do you know if it was still an active certification in 1975 when you applied for the Recreation Director's position? A. No, I do not know.

Mr. Van Hoy: Your Honor, may I have just a minute, please?

[38] Q. Ms. Anderson, you have said you believe that your leadership qualities are better than Mr. Kincaid's or were in 1975. Is that a correct characterization of your testimony? A. Yes, sir.

Q. Did you know then what, if any, leadership positions or experience Mr. Kincaid had had? A. No, sir.

Q. You have also said, did you not, characterizing your testimony correctly, that you believed your educational qualifications to be superior to him for this position? Is that a correct characterization of your testimony? A. Yes.

Q. You didn't know what his education was, did you? A. Just from what Ms. Boone had told me.

Q. And she had told you incorrect information, hadn't she? A. I'm sure at the time she didn't think it was that way.

Q. You know now it was incorrect, though, don't you? A. I'm taking it for what you said, sir, that he had his degree then.

Q. You also talked about your own superior credentials in the ability to supervise? A. Right.

Q. In 1975 when you applied for this position, did you have any knowledge whatsoever of what Mr. Kincaid's training or experience had been in supervising people? [39] A. I only had heard that he worked in the capacity of the Little League one summer at Bessemer City.

Q. Do you know what capacity that was or what you heard? A. That he worked with the ball team one summer—that's all I had heard.

Q. Did you hear he had worked as a coach? A. No, sir.

Q. Did you hear he worked as a player? A. No, sir.

Court: You know, I can pay a lot more attention to this information when it comes as evidence instead of what she hears or doesn't hear about Kincaid's background. I'm interested in learning but this is no way to show the Court what Kincaid's background and experience is.

Mr. Van Hoy: We'll connect that up, Your Honor.

Court: Just skip this sort of questions with this witness so we can move on into the evidence.

Mr. Van Hoy: I'm almost through, Your Honor.

Court: Unless she knows, she can't testify about his background, education and experience or what he looks like. Do you know what he looks like?

A. Yes, sir.

Court: She may testify about his appearance. Unless she knows something, let's stop digging into this empty mind.

Q. You testified about a conversation with Neil Barnes —if [40] I'm characterizing your testimony correctly—that Mr. Kincaid had perhaps been preselected because he was from one of the older families in Bessemer City. Didn't you say that? A. Yes, I did.

Q. Where are you from originally? Of what town are you a native? A. Bessemer City.

Q. You've lived there most of your life, haven't you? A. I moved away for—I don't know—about twenty years.

Q. When did you come back to Bessemer City? A. 1971.

Q. Did you go to high school in Bessemer City? A. No, sir.

Q. Did you go to elementary school? A. Yes, sir.

Q. Have you lived in Bessemer City continuously since 1971? A. Yes, sir.

Mr. Van Hoy: That concludes cross-examination of this witness, Your Honor.

Court: Any redirect?

Mr. Gibson: Just one question, Your Honor.

Redirect Examination by Mr. Gibson:

Q. Ms. Anderson, Mr. Van Hoy asked you about courses you've had or have not had involving various activities. Have you had any [41] experience umpiring sports games as a part of your duties as a teacher? A. Yes, sir.

Q. Is that sort of a normal everyday part of organizing and supervising children's games? A. Yes, sir.

Q. Do you know something about or do you know anything about first-aid or seeking to obtain first-aid for somebody who has been injured? A. Yes.

Q. Mr. Van Hoy also asked you about public speaking. Did you smile when he asked you that question? A. Yes, I did.

Q. Why did you smile, Ms. Anderson? A. I feel like I'm always in the process of the public and doing public speaking.

Q. As a part of your duties as a teacher? A. Yes.

Q. You talked about your activities with, I believe, the Exchangette Club. Did that include any public speaking as a part of their activities? A. Yes, sir.

Q. What would that have been a part of? A. Well, any time that we had to raise money or any kind of activities to help with the crippled children, we were—I was [42] always going before groups and explaining this to them.

Q. Mr. Van Hoy also asked you about whether you had any courses or experience in recruiting umpires. Have you ever had any experience in recruiting people to work for something you were involved in? A. All the time.

Q. Is that part of the PTA? A. Yes, sir.

Q. What about with the clubs you have been involved with? A. Also with the clubs, as well as the activities at school.

Q. Mr. Van Hoy asked you about courses in budgeting for a recreation program. Have you had experience with budgeting and bookkeeping and that sort of thing? A. I've had experience in bookkeeping, and since I've been in teaching I'm always planning trips, and I have to budget the money and know how much there is to spend, how much I have to spend.

Q. Mr. Van Hoy also asked you whether you knew what the duties of the Recreation Director were in 1975. Is that right? A. Yes.

Q. Prior to your interview, had you been given any kind of listing of the duties and responsibilities, or had they been described to you in any way? A. No, sir.

Q. Had any qualifications or educational requirements been [43] given to you, or were you told of any? A. No, sir.

Q. Mr. Van Hoy asked you about night work. Would you have been willing to do night work if you had been hired in that job? A. I believe in my deposition I stated, and also the EEOC, I stated I anticipated there would be night work.

Q. Were you willing to do night work if that was part of the job? A. Yes.

Q. Mr. Van Hoy also asked you about your North Carolina Recreation Certification. Have you received anything from anybody from the State government or anybody else telling you your certification is no longer valid? A. No, sir.

Mr. Gibson: That's all, Your Honor.
Court: Any recross?
Mr. Van Hoy: No, Your Honor.
Court: Thank you, Ms. Anderson.

LEONA BOWNER BOONE, a witness called by the plaintiff, having first been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Gibson:

Q. Would you state your name and address, please? A. Leona Bowner Boone, 505 North 14th Street, Bessemer City, [44] North Carolina, and they refer to me as Auddie.

Q. Are you presently employed, Ms. Boone? A. Yes, sir.

Q. Where are you employed? A. Family Dollar Stores of Charlotte, North Carolina, Incorporated.

Q. How long have you been manager of that store? A. In Bessemer City—it's a chain.

Q. What's your position in the store? Are you manager? A. Manager.

Q. How long have you been manager of that sort? A. Of this particular one, it will be two years Easter. Before that, I was manager in Kings Mountain for two years.

Q. What kind of work did you do prior to managing the store in Kings Mountain? A. I was a clerk in Family Dollar Stores for one thing, and then prior to that I had a time there when I was employed . . .

Court: You need to talk louder so we can hear you.

A. I'm sorry, sir. I feel like I was unemployed but I was employed. I was giving classes at the Gastonia Recreation Department.

Q. Approximately what year would that have been? A. '74.

Q. So, since 1974 or '75 you have been . . . A. It was after that. I guess it was, must have been '77. [45] It was right before I went to work for Family Dollar Stores.

Q. Do you remember where you were employed in 1975? A. Moore's Industry. Mr. Moore, he was in Dallas. It's a manufacturer, Roy Moore.

Court: What is that?

A. It's a manufacturer, a T-shirt manufacturer.

Q. Ms. Boone, would you—may I have a moment, Your Honor? Ms. Boone, how long have you lived in Bessemer City? A. Oh, dear.

Q. Approximately. A. Since 19, off and on since 1947.

Q. Have you held any elected offices in the City? A. I was appointed to a seat that was vacated.

Q. A seat on the City Council? A. On the City Council.

Q. Do you remember when that was? A. No, sir, I don't remember the years.

Q. Have you ever run for City Council? A. I have.

Q. When did you run? Do you remember? A. Several times.

Q. Have you been successful? A. I have always lost.

Q. Were you on the City Council in 1975? A. (Shakes head affirmatively)

[46] Q. Were you involved in the selection process to fill the position of Recreation Director in March, 1975? A. I was. The City Council is broken up—three Council members take over a department. I happened to be Chairman of the Recreation Department, and I was appointed to—as a Chairperson for hiring a Recreation Director.

Q. You say you were appointed. Who appointed you as Chairman of that committee? A. As far as I know, it was

Jim Ramsey. I received a letter from him telling me that I was.

Q. Did you state—who was Jim Ramsey? A. He was the Mayor of Bessemer City.

Mr. Gibson: May I have a moment, Your Honor? I have misplaced one of my exhibits.

Q. Ms. Boone, were you given any documents or guidelines or criteria for filling the position of Recreation Director? A. No.

Q. As far as you're aware, was there any initial screening or process to rule out applicants? A. No.

Q. I had you what has been marked as Plaintiff's Exhibit 14 and ask you if this is the letter, a letter you received from James Ramsey, Mayor of Bessemer City. A. Yes.

Q. Did you receive any other documents as part of your appointment [47] to that position? A. None.

Q. Would you describe how the committee—first off, do you remember who was on the committee? A. Myself as Chairperson, Time Helms from the City Council, Harold McClellan from the Recreation Department, Joe Butler and Gene Nichols. Those latter three were from the Recreation Department.

Q. Would you describe how the committee went about selecting a person to fill the job of Recreation Director? A. By interview.

Q. Would you describe how the committee carried out the interviews? A. Oh, in closed-door sessions. They were called in one at a time and asked questions.

Q. Did the committee ask the same questions of all of the candidates? A. No.

Q. Do you remember whether Ms. Phyllis Anderson was interviewed? A. She was interviewed.

Q. Do you remember what kinds of questions—do you remember any of the questions that Ms. Anderson was asked?

Court: Let's just stop a minute. Wait a minute. I guess you can go ahead. Some magic seems to have occurred out there.

[48] Q. Do you remember whether Ms. Phyllis Anderson was interviewed by the committee? A. She was.

Q. Do you remember any of the questions that the committee members asked Ms. Anderson? A. One, specifically, that provoked me—the night work and how her family would like it—two.

Q. Did the committee members ask her how the family would like her having that job? A. Uh huh.

Q. When you say that provoked you, what do you mean by that? A. I have got a family of my own. I was setting up there with the job that I was doing, and I have worked, and some things interfere and some things don't, and I didn't feel like it would interfere. It was really irrelevant to the interview.

Q. Did the committee members ask that same kind of question of the other applicants? A. Not that I recall.

Q. Were there any other female applicants? A. No.

Q. Did the committee members, as best you can remember, emphasize any particular area of recreation? A. Oh, yes. They all emphasized football, baseball and basketball, and I'm sitting there, and I see other facets of recreation that wasn't even dwelled upon.

[49] Q. What other areas? A. Performing arts, fine arts, music, recreation for the handicapped, recreation for the elderly, and I don't mean just recreation. When you say recreation for the elderly, it's not recreation. It's things to do, for their hands to do.

Q. What was your reaction, Ms. Boone, to the kinds of questions the committee asked Ms. Anderson? A. Like I said, those two—otherwise, the questioning was basically the same to all the applicants except for those two.

Q. Backing up a minute, do you remember how long the interviews lasted generally? A. I'd say roughly— this is pure speculation because I don't recall really. I'd say roughly ten minutes.

Q. Do you know Donnie Kincaid? A. Yes.

Q. Do you know his family? A. Yes.

Q. Do you believe that Mr. Kincaid's family background had any influence on the committee's decision?

Mr. Whitesides: We object to that.

Court: Sustained.

Q. Who was best qualified for the position of Recreation Director in your opinion? A. In my personal opinion, I felt Phyllis Anderson was the best qualified, and that's all-around qualified.

[50] Would you explain what that was based on? A. Her past experience, her educational background. I knew about how she had worked with, well, with her own, for example.

Court: Her own what?

A. Her own children, for example, and backing that up with her professional experience.

Q. Do you know what standards the committee applied in determining who was the best candidate? A. I don't know what they applied. I know what I was trying to apply.

Q. Did you in 1975 have an opinion, from the context of the interview and your feelings with the other com-

mittee members, whether they wanted a man for that position?

Mr. Whitesides: Objection.

Court: She may testify as to what she heard or observed. She may not testify from some deep suspicion unsupported by any kind of evidence.

A. I have no evidence.

Court: All right.

A. But I still suspected it.

Mr. Whitesides: I move to strike.

Court: She hasn't answered the question that the objection was addressed to, has she?

Mr. Whitesides: Yes, sir. She said equivocally, no, I have no evidence that the committee wanted a man. Then she [51] turned and parenthetically said I have my deep suspicions. We want the record to show you told her not to say that.

The Court: Motion is allowed.

Q. Ms. Boone, I show you what has been marked as Plaintiff's Exhibit 11 and ask you if it's a letter and resumé of Donald F. Kincaid. A. Uh huh.

Q. Ms. Boone, based on your review of that resumé in 1975, can you tell how many years of work experience Mr. Kincaid had?

Mr. Van Hoy: The document speaks for itself.

Court: Are you objecting?

Mr. Van Hoy: Yes, Your Honor.

Court: You may tell whatever you observed from the exhibit. First, do you have any knowledge about that question?

A. No, I haven't—one year, but not Director of a Recreation Department.

Mr. Van Hoy: I can't hear that, Your Honor.

Mr. Gibson: We're going to put this in later, Your Honor.

Court: I sustain the objection. I'm curious about the facts the question seeks to elicit but the information given by Mr. Kincaid on this and on . . .

Mr. Gibson: We move . . .

Court: I guess this is the only information there is in the file. It would appear to show he spent three years at [52] Appalachian and worked a year at Commercial Credit Corporation or part of the year in the Finance Department and had been active in sports in college and presumably before. I don't think we need to have a witness interpret his application who is not familiar with him and his background.

Mr. Gibson: Well, we move to admit Plaintiff's Exhibit 11, Your Honor.

Court: Admitted.

Q. Ms. Boone, as part of the committee's work, were various applications and resumés given to the committee? A. Yes.

Q. Did the committee review the various applications and resumés? A. I seen—I think it was roughly eight applications—I think a day prior to the interviews.

Q. Are you saying you saw the applications at least a day or so prior to the interviews? A. A day.

Q. Were you able to reach some determination about the qualifications of some of the other candidates, including Mr. Kincaid? A. Yes.

Q. Were the conclusions you reached part of your opinion that Ms. Anderson was better qualified? A. Yes.

[53] Court: Did you do all the interviews on the same day?

A. Yes, sir.

Q. Were you familiar in 1975 with the duties of the Recreation Director? A. I think so, to a certain extent. I had been on the Recreation Committee for Bessemer City, and the statutes from the State of North Carolina, it states fairly full of what the qualifications are of a Director and who is to fire and who is to hire. Now, whether that statute was true, I don't know.

Q. Was there anything within your knowledge of the duties of the Recreation Director that would have prevented Ms. Anderson or a woman to perform in that job? A. No.

Q. Was there ever a specific educational requirement communicated to you as Chairman of that committee? A. No.

Mr. Gibson: No further questions, Your Honor.

Court: Any cross-examination?

Cross-Examination by Mr. Van Hoy:

Q. Ms. Boone, you said you believed that the City officials wanted to put a male in that position. Isn't that correct? That was your testimony? A. What my testimony really is . . .

Court: I thought I sustanied objection to that question, [54] your objection, about 4½ minutes ago. I struck the answer from the record.

Q. You were . . .

Court: Just a moment, Mr. Van Hoy. Tell me in which direction you're going. I have sustained your

objection to that question and have stricken the answer from the record.

Mr. Van Hoy: I will not ask it again, Your Honor.

Court: Do you want the last answer to stand?

Mr. Van Hoy: No, Your Honor.

Court: Are you moving to strike your question and your answer?

Mr. Van Hoy: Yes, I suppose I am.

Court: Motion denied. Okay, now you've got it both ways.

Q. You were Chairman of that selection committee, were you not? A. Yes, sir.

Q. Mayor James Ramsey appointed you to be Chairman, didn't he? A. Yes.

Q. Is James Ramsey a male or female? A. He's a male.

Q. Prior to the interviews with the applicants for the position, did anyone approach you to encourage you to choose or favor one candidate or another? A. No. I had talked to several.

[55] Q. You had talked to several of who? A. Of the applicants.

Q. You had before the interviews? A. Right.

Q. Who had you talked to? A. Jerry Millwood. I hadn't talked to Donnie Kincaid. I didn't talk to him because I don't think he was in town that day, but I did talk to Jerry and Phyllis and . . .

Q. Is that Phyllis Anderson, the plaintiff? A. Yes. I don't know whether it was—it might have been. Yes, it was Jerry, and I can't think of the other man's name—Jerry Millwood—there were three, I think.

Q. You had interviewed the plaintiff prior to the interview? A. I hadn't interviewed them.

Q. You had discussed the job? A. They had asked me about the job.

Q. Tell us what you remember about where that conversation occurred. Did the plaintiff approach you? A. Pardon?

Q. Did the plaintiff approach you about the position? A. No.

Q. Did you seek her out? A. Yeah.

Q. You sought her out? Was it to get her to apply for the position? [56] A. No, sir.

Q. Why did you seek her out? A. We just—we live in a very small town. It's not like Charlotte. You know, you go down four blocks and you've had it. Okay?

Q. Let me see if I can clear this up. Before the night of the formal interviews, did you talk to the plaintiff about the position? A. Not about the position. You mean about what I would ask on the interview?

Q. Anything about that Recreation Director's position. A. No.

Q. Do you have any knowledge that any of the applicants or anyone else encouraged the committee members to vote for one person or another before the interviews were conducted? A. Would you mind stating that again, please, sir?

Q. I'm asking what you personally know. Do you know if anyone or have you heard that anyone encouraged any member of the selection committee to vote for one or more of the applicants prior to the time of the interviews? A. I do not know specifically—a woman's intuition that it had been settled.

Q. A woman's intuition? What is that intuition based on? A. I just felt like it had already been settled, that Mr. Kincaid had the job before we ever went to the interviews.

[57] Q. What was the basis for that belief? A. Things that were said.

Court: All right.

A. We're back on it again, sir.

Court: I'm going to go back and clean up the record by striking out the previous testimony about what she believed. My ruling is now consistent on that subject. I sustain the objection to the last question. Let's get out of theology and back on the facts.

Mr. Van Hoy: Your Honor, I believe the record will reflect what the basis of her knowledge was.

Court: She said she had a belief—woman's intuition. I thought she said she didn't have a basis for it. Do I misunderstand what you have said?

A. That is what I said, sir.

Court: Okay, let's get along with the facts. You may inquire if any member of the committee had expressed to her any opinion before the interviews began as to whom they were going to vote for for the job. Will you answer that question to me? Did anybody on the committee tell you who they were going to vote for or who they were leaning towards?

A. No, sir, not them personally.

Court: Okay.

Q. Did anyone outside the committee tell you that anyone on the committee had a particular person they were going to vote [58] for? A. That went through three doors. I lost it on the second one.

Q. We're talking about not the committee members, not those people. Did anyone in the City of Bessemer City or anywhere else tell you that anyone on the selection com-

mittee had made a choice ahead of time, before those interviews? A. No. There, again, it's just—they said they felt like—here it was their feelings about it.

Q. Who is the they you're referring to? A. Citizens of Bessemer City.

Q. Do you know any names? Can you give us any names? A. No. I was in the shop at that time, and it was customers coming in—like a double standard.

> Court: Unless it was a most unusual committee, they would undoubtedly have had importunings from a number of people on behalf of themselves or others for the job. I don't know of any illegality or impropriety if that occurred. If that is what you're trying to put over, it's immaterial to me, what politicking took place. If there was no politicking done about a public job, Bessemer City is a strange place. Let's get back to the lawsuit.

Q. You testified, did you not, that you disagreed at that time with others on the selection committee about the emphasis on team sports in the program? Is that correct? A. Disagreed with them about the emphasis on team sports?

[59] Q. Yes. A. I didn't disagree with them, but I felt like that was a limited basis. You can't just stop with team sports. That's not recreation. Recreation is any activity performed. I mean I'm doing an activity really right now.

Q. Are you saying you are engaging in recreation right now? A. I'm not in recreation, but it's activity. When you say recreational activity, it can't be just baseball, football, basketball. There is no way. That's what the emphasis was on.

Q. What sort of additional programs were you interested in seeing implemented when you reviewed the various applicants? A. I'll tell you one specifically. That was dance

classes that would be taught by an individual, as Recreational Director, without the children having to pay for it, because my children were going to dance school, but there are so many that don't get the opportunity, and they don't have the money to flap out, and it wouldn't take a trained ballerina to go into a Recreation Department and teach dancing. It takes someone that just wants to show them the basics of dance, waltzing.

Q. Any other programs you would have liked to see implemented? A. Art, the performing arts—dramatics, public speaking.

Q. Dramatics, public speaking — anything else? A. Physical exercise, physical education, plus football, baseball, basketball, volleyball.

Q. Did you personally conclude that the plaintiff, Ms. Anderson, [60] would be better qualified than Mr. Kincaid to institute a dance program? A. No. I think Mr. Kincaid would be fine.

Q. You do not believe in that sense Ms. Anderson's qualifications were superior? A. No, indeed.

Q. How about art, do you believe either one of them had qualifications superior to the other? A. That wasn't the basis of the hiring of a recreation—you asked me what I felt like would be . . .

Q. What you were looking for in qualifications as a member of the committee . . . A. As an all around Director, I felt like Phyllis was the better applicant.

Q. As to the subject of art, specifically? A. No.

Q. As to the subject of dramatics? A. No, a rounded program, sir.

Q. As to the subject of public speaking, specifically? A. No, sir.

Q. As to the subject of team sports, specifically? A. No.

Q. Do you remember what questions, if any, you asked Mr. Kincaid about his training for the position either

through experience or college courses? [61] A. I don't remember really asking Mr. Kincaid anything specifically, because I think he's a fine young man, but I was under the impression, though, that he was not out of school at that time.

Q. Do you mean by that that he had not yet graduated from school? A. Yes. I knew he was pending coming into town. I think we just asked him what would be his program, and that was his program.

Q. On that subject about being your belief he was not yet out of school, it's true, is it not, that you subsequently told Ms. Anderson he was not out of school? A. I did.

Q. At the time of those interviews, did you know what courses, or as a result—strike that. At the time of the interviews or as a result of the interviews, did you know what Mr. Kincaid's college curriculum consisted of? A. I know it was physical education.

Q. You knew that then? A. Yes, and I think he's a fine young man and he and his Assistant Director have been marvelous.

Q. Do you recollect a conversation in your shop with fellow committee member Joe Butler a couple of days before the interviews about this position? A. No, I don't.

Q. Do you remember speaking about Mr. Kincaid and why you could [62] not vote for him for this position? A. I said I felt like he was too young.

Q. Did you not say to Mr. Butler that you could not vote for Kincaid because his family had run Bessemer City long enough? A. No.

Q. You did not say that? A. No, not in that—in those words. I sure didn't.

Q. Did you say something that meant the same thing, if not specifically those words? A. No.

Q. You do remember that conversation with Mr. Butler? A. I really don't remember it with Mr. Butler. That's been too many years ago.

Q. Did you indicate to Mr. Butler before the interviews —once again, in your shop—that "it looks like it will be between Kincaid and Anderson"? Did you tell him that? A. I thought they were the best qualified.

Q. Did you tell him that, yes or no? A. I don't recall.

Q. You don't recall saying that? A. To Mr. Butler in my shop?

Q. Yes. A. No, I do not recall.

Q. When the vote was taken about who the committee was going to select, was it taken the evening of the interviews? [63] A. Yes.

Q. At the same meeting? A. Yes.

Q. Do you remember what that vote was? A. Four to one.

Q. Who received four votes? A. Mr. Kincaid.

Q. Who received one vote? A. Phyllis.

Q. Who voted for Phyllis? A. I did.

Q. Harold McClellan was on the selection committee with you, was he not? A. Yes.

Q. You have run against him for the City Council in a head-to-head race, have you not? A. I think that is irrelevant.

Q. You have, haven't you? A. Yes, I have.

Q. He beat you, too, didn't he? A. Yes.

Q. That committee was selected by Jim Ramsey, you have already testified. You have also run against him for City Council in a head-to-head race. Isn't that correct? A. Yes.

[64] Q. He beat you, too, didn't he? A. Yes, sir, fair and square. We shook hands. Now, are we going to make something of that? And I still think the world and all of him. I may add that, can't I, Your Honor?

Court: You did.

A. Even Mr. Kincaid.

Q. After those interviews, the evening of those interviews, at any time did you tell Ms. Anderson, the plaintiff, that you believed she was not selected because she was a woman? A. I did make that statement, but I don't recall—I'm not going to bring it back to mind, but I recall making the statement but when, I don't know. You say at that time in the evening?

I don't know whether it was because, you know, we were women and we were there late for this meeting which on recreation they emphasize so much about night work, but we were up there. I don't know whether it was 8, 9, 10 or what time, but I did make that comment.

Q. You were present at the interviews of all the applicants? A. Yes, sir.

Q. Do you know if Ms. Anderson said during her interview to the committee I know you won't hire me because I'm a woman? A. She did not. I think it was my comment after the interviews.

Q. Is it not true that you told Ms. Anderson that your own third choice for the position was Donnie Kincaid? [65] A. My third choice?

Q. Yes. A. Yes.

Q. And there were a total of eight applicants, weren't there? A. Uh huh.

Q. You testified about the famous question about the family's reaction to the job. Who on the committee asked Ms. Anderson that question? A. I don't recall.

Q. So, like Ms. Anderson, you know it was asked but you don't remember who asked it? A. It was either Tim Helms—Tim, I'm not going to put you on the spot. Let me say I don't recall. I'm not going to say because it would be just like picking a name out of a hat.

Q. Do you deny that the other applicants, aside from the plaintiff, were asked about the prospect of working at night in that position? A. Not to my knowledge.

Q. Are you saying they were not asked that? A. They were not asked, not in the context that they were asked of Phyllis. I don't know whether they were worried because Jim wasn't going to get his supper or what. You know, that goes both ways.

Q. Did you tell Phyllis Anderson that Donnie Kincaid was not asked about night work? [66] A. He wasn't asked about night work.

Q. That answers one question. Now, let's answer the other one. Did you tell Phyllis Anderson that, that Donnie Kincaid was not asked about night work? A. Yes, after the interviews—I think the next day or sometime, and I know—may I answer something?

Q. If it's a question that has been asked; otherwise, no. It's up to the Judge to say. A. You asked if there was any question asked about—I think Donnie was just married, and I think I made the comment to him personally—and your new bride won't mind.

Q. So, you asked him yourself about his own wife's reaction? A. No, no.

Q. That is what you just said.

Mr. Gibson: Objection, Your Honor.

Court: Sustained. You don't have to rephrase the answer.

Mr. Van Hoy: That completes cross-examination of this witness, Your Honor.

Court: Any redirect?

Mr. Gibson: Just a minute, Your Honor. We have no other questions. We move to admit Plaintiff's Exhibit 14 which was identified by Ms. Boone.

Court: Let it be admitted. We'll take a break. Tell me how much more evidence the plaintiff has.

[67] Mr. Gibson: We were going to put on Mr. Barnes, which should take 15 minutes or 20, but we'd prefer the Court allow the break, first. We

have just gotten some documents we want to ask him some questions about.

Court: I want to know, if you can tell me, how long the rest of the plaintiff's testimony will take.

Mr. Gibson: Fifteen minutes for our portion and then some cross-examination.

Court: What is your guestimate, Henry, about the duration—Mr. Van Hoy, about the duration of the defendant's evidence?

Mr. Whitesides: I think we have five or six people. I think we'll probably take 30 minutes a person.

Mr. Van Hoy: With the exception of Mr. Kincaid—Mr. Kincaid's testimony will be considerably more extensive than that.

Court: Why? Well, I'll wait and hear about it.

(Short Recess)

Court: All right.

Mr. Gibson: During the break, I conferred with Mr. Van Hoy for two purposes. We were going to put Mr. Barnes on the stand to show Mr. Kincaid's earnings during 1981 and '82, and in our Exhibit 17, which the Court doesn't have a copy of . . .

Court: I think there is one here.

Mr. Gibson: It was used with Ms. Anderson. They are willing to stipulate . . .

[68] Court: Those are his earnings?

Mr. Gibson: That's right. What we've done is taken from Ms. Anderson's W-2 Forms and her income to date and put in the left column all of her income since '75, and in the right column under Mr. Kincaid's name taken from the answers to interrogatories the earnings in 1975, and then that large figure there were his earnings from '76 through the time they answered interrogatories in 1981, and they

are willing to stipulate that the figures opposite 1981-82 are his additional earnings and are correct, and we move to admit Exhibit 17.

Court: All right, let it be admitted.

Mr. Gibson: I believe we did not move to admit Exhibit 16, and we'll now move its admission.

Court: Admitted.

Mr. Gibson: The only other purpose to call Mr. Barnes at this time would be to ask him some questions about some applications that have been submitted. If we are going to offer any of that evidence, we can do it on rebuttal; therefore, we won't call him at this time.

Court: All right.

Mr. Gibson: We just got those documents today, and if we want to ask some questions we would like to be able to do that tomorrow.

Court: Okay.

Mr. Gibson: The plaintiff would rest, Your Honor.

[69] Court: Any evidence for the defendant?

Mr. Van Hoy: Yes, Your Honor. The defendant first calls Donald Kincaid.

Donald F. Kincaid, a witness called by the defendant, having first been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Van Hoy:

Q. Will you state your name and address, please? A. Donald F. Kincaid, 206 West Ormand Avenue, Bessemer City.

Q. Are you presently employed? A. Yes, I am.

Q. By whom? A. The City of Bessemer City.

Q. In what job title? A. Parks and Recreation Director.

Q. How long have you held that position? A. Approximately 7½ years.

Q. Were you hired in 1975? A. Yes, sir.

Q. Have you been continuously employed in that position since 1975? A. Yes, sir.

Q. Are you a college graduate? A. Yes, sir.

[70] Q. From what institution did you graduate? A. Appalachian State University.

Q. What was your degree? A. Health and Physical Education.

Q. Is that a Bachelor of Science? A. Bachelor of Science.

Q. When did you get that diploma? A. I graduated in March of 1974. That's when I finished my work. I didn't get the diploma until May of '74 at the graduation exercises.

Q. Do you have any professional certifications as a recreator? A. I'm a member of the North Carolina Recreation and Parks Society and the National Recreation and Parks Society.

Q. Are you a certified, state certified school teacher? A. Yes, sir.

Q. What did you have to do to get the state certification, if you remember? A. Went through—majored in Health and Physical Education, did my student teaching and passed the NTE.

Q. Will you describe to the Court what the NTE is? A. National Teacher's Examination.

Q. Is that a written examination? A. Yes, sir.

Q. Do you know what year you received that certification? A. '74 when I graduated. March of '74.

[71] Q. Were you among the eight persons about which we've heard testimony that applied for this position of Recreation Director? A. Was I among them?

Q. Yes, sir. A. Yes, sir.

Q. Are you the same Donald Kincaid who got that position? A. Yes, sir.

Q. Let's talk about your college curriculum a little, Mr. Kincaid.

Mr. Wallas: We only think any of this is relevant with respect to what the committee knew. For the record, we'd like to state that we would object to anything that was not before the committee.

Court: How can we determine that?

Mr. Wallas: They have committee members who have not testified listed as witnesses. I assume they're going to testify.

Mr. Van Hoy: That testimony will connect that up, Your Honor.

Court: I take it this will be brief.

Mr. Van Hoy: I'll try to keep it brief.

Court: Go ahead. Objection's overruled.

Q. At Appalachian State, did you take team sports courses? A. Yes, sir.

Q. What types of courses—not the sports, but what types of team courses? [72] A. For example, football, soccer, basketball, track and field, badminton, tennis. Did I mention volleyball?

Q. Were these courses in which you just played the sports or something in addition to that? A. They are method courses—that's what they were called—three-hour courses where you were taught skills and techniques in, say, soccer or volleyball; taught how to teach these skills and techniques, how to evaluate the students and the rules of the sports, for example, soccer and so forth.

Q. Did you have any courses in elementary school physical education? A. Yes, sir.

Q. If you remember, what was the course content of those courses? A. It was elementary PE, physical educa-

tion. It was working—physical education in the elementary school, games for small children, different types of games for them, how to work with children of that age. We actually taught different games to our students or to the other members in the class.

Q. Did you have a college course in public speaking? A. Yes, sir.

Q. Did you have a college course in first-aid? A. Yes, sir.

Q. Did you have any courses in education of secondary students? A. Yes, sir.

Q. What did you cover in those courses? [73] A. Again, it was primarily, again, emphasis towards physical education, principles of working with high school students.

Q. Did you have a course in organizing and administering physical education? A. Yes, sir.

Q. Tell me about the content of that course? A. Okay, that includes things like budgeting, organizing leagues, programs, purchasing, insurance, maintenance, planning and developing facilities—things of that nature.

Q. Did you have a course in teaching physical education, specifically? A. I did my student teaching.

Q. Where did you do your student teaching? A. Mountain City, Tennessee.

Q. Did you teach physical education there? A. Yes.

Q. Did you actually engage in the instruction of students in your student teaching? A. Yes.

Q. Did you serve any sort of on-the-job training as part of your degree requirements there in Boone? A. I'm not sure what you mean.

Q. Did you spend any time at a school? A. We went to Watauga High School in a course I took.

Court: You'll have to keep your voice up so the reporter [74] and I can hear what you're talking about.

Q. Let's talk about your personal experience. Have you ever participated in the sport of football in a formal sense? A. Yes, sir.

Q. How so? Have you played on a team? A. From the time I was 10 until—through high school.

Q. What teams did you play on? A. Bessemer City High School.

Q. Did you play for the junior high team, also? A. Not for the junior high, not football. We played midget football at the time, and then . . .

Court: We're not hearing you over here because you're not talking loud enough.

A. I played midget football, and then I played high school football, four years of high school football, starting in the 9th grade.

Q. Did you ever yourself play the sport of basketball on an organized team? A. Yes.

Q. What team was that? A. I played for Bessemer City High School.

Q. How many years, if you remember? A. I started in the 8th grade, which would have been junior high, and then four years in high school, starting at Bessemer City High School.

[75] Q. Did you ever play on an organized baseball team? A. Yes, sir.

Q. At what ages, if you remember? A. Starting at age 6—that's when I was in Stanley. I came to Bessemer City and started at age 8 through 14—Little League baseball.

Q. Do you play tennis? A. Yes, sir.

Q. How long have you played tennis? A. Since my college days.

Q. Do you swim? A. Yes, sir.

Q. How long have you swum? A. All my life—I mean since I was five, anyway.

Q. Do you have any coaching experience coaching team sports, aside from the educational experience you have already discussed? A. Yes, sir.

Q. Describe that to the Court. Are you speaking of now or before I got the job or both?

Q. At the time you applied for the job or prior to that. A. I was coaching in the Optimist Little League basketball program before I got the job.

Q. How old were your players on that team? A. Ages 8 through 13.

Q. Were you still in that coaching capacity at the time you [76] applied for the Recreation Director's position? A. It was right at that time. The program, it went into March, so I can't tell you exactly if the program had ended when I applied or not. It's around that time.

Q. Are you a native of Bessemer City? A. Yes, sir.

Q. Did you grow up there? Have you ever lived anywhere else? A. Well, like I mentioned a few minutes ago, I lived in Stanley two years when I was five and six.

Q. Aside from that? A. I have lived in Bessemer City.

Q. The sports you've described—football, basketball and so forth—did you participate in those on an organized basis in the Bessemer City facilities—on the playing fields, in the gyms? A. Yes, Bessemer City High School, right.

Q. Let's talk about the circumstances of your job interview for this position. Do you remember where the job interview was conducted? A. At City Hall.

Q. Is that in Bessemer City? A. In Bessemer City.

Q. Do you remember who was present for your interview? A. Mr. Butler, Harold McClellan, Gene Nichols, Tim Helms and Auddie Boone.

[77] Q. At the time you were interviewed, were any of the other interviewees present in the room? A. No, no, sir.

Q. At the time of the interviews of any of the other applicants, were you present in the room where the interviews were conducted? A. Were any other applicants present?

Q. Did you hear the interviews of any of the other applicants? A. No, sir.

Q. Were you asked about your willingness to work at night as a condition of getting that job? A. I know I made the comment that it would be like a life insurance salesman when you were—there would be hours after your regular working hours, yes, sir.

Court: The question was did anybody ask you about that.

A. I cannot pinpoint the question but I know I made the comment that it would be after hours work, as if I was selling life insurance, which I had done some of that before I moved back to Bessemer City.

Q. Was your comment in response to a question?

Mr. Wallas: Objection to the leading, Your Honor.
Court: Sustained.

Q. Prior to the time of the formal interview, had you discussed this position with anyone on the selection committee? A. No, sir.

[78] Q. Do you know of anyone else doing so on your behalf? A. No, sir.

Q. At the time of the interview, had you already graduated from Appalachian State? A. Yes.

Q. Had you already done your practice teaching in Mountain City, Tennessee? A. Yes, sir.

Q. Did you already have your teaching certificate? A. Yes, sir.

Q. Let's talk about the requirements of this job. Do you have any persons who you supervise now? A. Yes, sir.

Q. Do you have authority to hire those persons? A. Yes, sir.

Court: What is the relevance of that question?

Mr. Van Hoy: What the job content is, Your Honor.

Court: This has nothing to do with the qualifications that the committee weighed in 1975.

Q. In 1975 when you got the job, were there any other employees of the Recreation Department? A. There was a secretary and a maintenance person.

Q. After you assumed the position, did those persons report to you?

Court: Objection's sustained.

[79] Mr. Van Hoy: Excuse me a minute, Your Honor.

Court: We'll take a two-minute recess. I observe an unholy intrusion. You want to see me or some of these people who can do you some good? You all will pardon the intrusion by Mr. Stack. All right, are you ready to go ahead?

Mr. Van Hoy: Let me have just another minute, please, Your Honor. We're ready to proceed, Your Honor.

Q. At the time you interviewed for the job, were you available to take it then if you were hired? Were you ready to take the position? A. Yes, sir, except for, you know, a two-week working notice.

Q. Was that with your employer at that time? A. Yes, Commercial Credit, yes.

Q. During the interview, did you—were you asked about what your concept of the Recreation Director's job would

be? A. Again, I can't remember the definite questions. I was asked certain questions on programs, yes.

Q. To the degree that you can remember, how did you respond to that? A. Okay, I can, you know, I told them I would set up programs definitely in athletics. July 4th—I knew we had never had anything in Bessemer City for the 4th of July, a celebration of that nature—you know, just general programs—slimnastics, ballet, tap, jazz, decoupage—programs of that nature. Exactly what programs I said I was going to offer, you know, I can't [80] remember that, but I know that I gave a general picture of what the programs would be, an overall general picture of it.

Q. You mentioned an interest in setting up a decoupage program. Did the Recreation Department have one at that time? A. Yes, decoupage they did.

Q. Does it have one now? A. Not at this time. We offered it but it didn't go through.

Q. Has the department had a decoupage program any time since you've had the job? A. Again, I can't remember if we—we offered decoupage. I'm not certain if it went through or not.

Q. At the time you applied for the position, you mentioned a dancing program. Was there a formal dance program then? Do you know? A. No, sir.

Q. Is there one now? A. Yes, sir.

Q. Has that been implemented since you took the position? A. Yes. There was dance programs in Bessemer City but not within and sponsored by the Recreation Department.

Q. Are you responsible for the preparation of a budget for the department? A. Yes, sir.

Q. Who do you prepare that budget for?

Court: Tell me the relevance of this.

[81] Mr. Van Hoy: Once again, job content.

Court: Objection is sustained. The questions about qualifications are questions that have to do with the circumstances and equipment of these people when they were applying for the job. The questions about motivation had to come out of actions of the defendants. The job content—what he's done since he came in—is not material to anything I have got to decide.

Mr. Van Hoy: That completes the direct examination of this witness, Your Honor.

Court: Any cross-examination?

Mr. Wallas: Yes, sir.

Cross-Examination by Mr. Wallas:

Q. Mr. Kincaid, how did you find out about the Recreation Director's job? A. I can't tell you exactly how I found out. There was talk around the gym where I was working with the basketball team. I heard comments around the gym about, you know, the position coming open. I guess that's where I first heard about it.

Q. Hadn't you worked with some of the members of the selection committee one summer helping with one of the baseball teams or other teams? A. No, sir.

Q. You never worked with Mr. Butler or Mr. McClellan? A. Not during the summer, no, sir.

[82] Q. Anytime prior to becoming Recreation Director? A. They were working with the basketball program.

Q. The same one you were working with? A. Yes, sir.

Q. Do you recall that perhaps Mr. McClellan and Mr. Butler mentioned that the job was coming vacant? A. Mr. Butler did mention it to me, yes.

Q. So, refreshing your recollection, it was Mr. Butler who suggested you apply for the job? A. He didn't suggest that I apply for the job. He just told me the job

was open. Who I first heard it from, I couldn't tell you that.

Q. Now, you submitted an application for the job in the form of a letter. Is that correct, Mr. Kincaid? Let me be more specific. A. It's been a long time.

Q. I believe this is Plaintiff's Exhibit 11, which has been admitted into evidence. Is that a letter that you wrote, dated March 17, 1975? A. I guess it is, yes, sir.

Q. I notice that this copy isn't signed. Do you have any reason to know if you signed the original of that letter? A. It's been a long time.

Q. There is a resumé attached thereto that purports to be your resumé. Is that your resumé at the time you applied for [83] the job on March 17, 1975? A. Yeah.

Q. Did you submit any other documents to the selection committee other than Plaintiff's Exhibit 11? A. Other than what you've shown me here—I don't remember.

Q. As far as you can recall, there were no other documents detailing your experience or education or anything submitted to the committee. Is that correct? A. Again, I don't remember, but that may be correct. I don't know.

Q. Did you bring any documents to the interview? A. No.

Q. Now, you say you have a professional certification, North Carolina Recreation and Parks Society. Is that correct? A. I said I had a certificate and was a member of the North Carolina Recreation and Parks Society.

Q. When did you obtain that? A. When I joined the association about 7½ years ago.

Q. Was that after you obtained the job with Bessemer City? A. Yes.

Q. That was a certificate you obtained after you received the job? A. Yes.

Q. You had your school teacher's certificate before you obtained the job with Bessemer City? [84] A. Yes.

Q. Mr. Van Hoy asked you a number of questions about your curriculum at Appalachian State. Do you recall if you were asked any questions at the interview about your curriculum? A. No, sir, I don't recall.

Q. So, to the best of your knowledge, you did not tell anybody on the interview committee exactly what courses you had taken, Is that correct? A. That's correct.

Q. Now, you'd had an opportunity, as I understand your testimony, Mr. Kincaid, to spend some time while you were in school working as a student teacher at some point. Is that correct? A. I did my student teaching, yes.

Q. That was part of your degree work? A. Yes, sir.

Q. You also worked at Watauga High School as part of additional course work? A. That's right.

Q. Did you find those experiences out in the field, so to speak, were helpful to you? A. Yes.

Q. In your student teaching at Mountain City, Tennessee, you taught physical education to what age group? A. High school.

Q. Would it be a fair statement to say that you learned from [85] that experience, being on the job and doing the work, that not everything was in the books that you needed to know for actually doing the work? A. I'd say experience is a good teacher, yes, sir.

Q. And that's a very important part of being a physical education teacher? A. Yes, sir.

Q. Let me see if I understand—how old are you, Mr. Kincaid? A. I'm 31.

Q. What is your date of birth? A. 1/3/51.

Q. Referring to the resumé attached to Plaintiff's Exhibit 11, the second page of Plaintiff's Exhibit 11, you listed on activity courses, method and activity courses, various sports—is that correct—baseball, football, basketball, volleyball, skiing, badminton, golf, track, soccer, tennis, swimming? A. That's correct.

Q. You also listed that you had participated in intramural programs. That was within the University, meaning that you had participated in a number of these sports in an intramural capacity? A. That's correct.

Q. And your experience in which you listed your past employment was the student teaching at Mountain City and the Commercial Credit job. Is that correct? [86] A. That's correct.

Q. That's the only experience you listed in your application? That's the only experience you had at that time? A. Well, I actually had an insurance position. You want me to mention it? I didn't list it.

Q. Did you tell the committee that you had an insurance job? A. No, I didn't.

Q. I believe you said you mentioned you worked at night? A. I told them it was like being a life insurance salesman, the hours. I did not mention that I did have a job in insurance.

Q. When did you go to work for Commercial Credit? A. According to this, it was in '74. It was in June, that summer.

Q. Right after your graduation? A. Actually, I had finished school in March of '74. I worked in the life insurance position for approximately two months. Then I came home and went to work for Commercial Credit in June of '74.

Q. And you worked in the Finance Department? Obviously, you had no recreational work in the sense that you do now? A. No.

Q. And you felt it was important to put on your resumé that you had gained experience in working with the public. Isn't that correct, while working for Commercial Credit? A. Yes, sir. I worked with the public.

[87] Q. You felt that was an important element of the recreational job, didn't you? A. I felt like it was important as far as working with the public.

Q. Had you ever worked with any elderly or handicapped people prior to March of 1975? A. Repeat that.

Q. Have you ever worked in any recreational programs with any elderly or handicapped people? A. When I was in school, we had a course where we did work with the handicapped.

Q. How much time did you spend working with the handicapped? A. I spent a quarter.

Q. Was that together with your in-classroom work? A. Yes.

Q. So, you went to a local facility? A. Actually, we worked with a man that had had a stroke. We went to his home and worked with him, four or five of us, an exercise program.

Q. Was that designed primarily for physical therapy? A. Adaptive physical education, health and physical education.

Q. You hadn't planned specific courses or activities for the elderly prior to March of 1975, had you? A. For the elderly?

Q. Yes, sir. [88] A. Programs?

Q. Yes, sir, planned programs. A. No, sir, I hadn't.

Q. Did you ever take a course in how to hire an umpire? A. How to hire an umpire?

Q. Uh huh. A. No, sir.

Q. Are you aware of any courses that you could take? A. No, sir. You can take officiating courses where you learn the rules of the game but not actually hiring one.

Q. But you had to hire umpires when you became Recreation Director? A. Yes.

Q. Did you have any trouble doing that? A. No, sir.

Court: What do you pay umpires? I've been asked to umpire a softball game in Gastonia Wednesday night. I want to know what to charge.

A. You want to know? Anywhere from seven dollars and up per game.

Q. What about for inexperienced umpires?

Court: Now, wait a minute. Any more questions, Mr. Wallas?

Mr. Wallas: Just a few more, Your Honor.

Q. Mr. Kincaid, did you receive at any time prior to your [89] interview for this position a list of the job duties of the Recreation Director? A. No, sir.

Q. Did you have any idea when you went to that interview exactly what the duties were going to be? A. I had my own ideas what it would be. I knew the facilities we had and what the city needed, philosophy and . . .

Q. You didn't know, I take it, specifically what the committee would be looking for in the way of a Recreational Director, what the outline of the job was. A. I did not have an outline of the job.

Q. Let me show you what's been marked as Plaintiff's Exhibit 15. That's a letter dated May 1, 1975, from Mr. Metcalf, who I believe was the City Manager at that time of the City of Bessemer City, to you. Is that correct? A. Yes.

Q. Did you receive that letter or the original of that letter? A. Yes. Now, you're speaking of did I receive the duties before?

Q. I understand that. You testified that you did not receive them. This is dated May 1, 1975. A. As far as I know, this was after I was hired.

Q. But you did receive this letter? A. It seems like I did. I can't tell you for certain. I know I received a job description of my secretary at that time. It [90] seems like I did get this. It's been a long time ago.

Q. When did you learn that you had been—when were you offered the job? A. The night I was interviewed.

Q. You were offered it that very night? A. I wasn't offered it. I was called that night about 11 o'clock.

Q. What were you told? A. The best that I can recall was that, you know, I got the job and for me to meet with Bill Metcalf the next day.

Q. Who told you that? A. The City Manager at that time, Bill Metcalf. I'm saying that night. It was either that night or the following night, but I believe it was that night I was interviewed.

Q. Let me show you, Mr. Kincaid, what's been marked as Plaintiff's Exhibit 8, and this purports to be a list of the duties of the Recreational Director of Bessemer City. As I read them, they are similar, if not identical, to those listed on that letter dated May 1. Did you ever receive at any time—I believe you have already testified you did not receive this list before the interview. Is that correct? A. Yes, sir.

Q. Do you remember receiving Plaintiff's Exhibit 8 or a copy of that at any time from the date of the interview to May 1, 1975? [91] A. If I did, I sure don't recall it. That's all I can say, no.

Q. Had you ever hired anybody prior to coming to work as Recreation Director? A. No, sir.

Q. You'd never supervised any employees, had you? A. No, sir.

Q. So, you had no prior experience before—did the committee ask you when you were interviewed whether you had ever hired or fired or disciplined or otherwise supervised employees? A. I couldn't say yes or no. I don't remember.

Mr. W[illiams]: That's all we have, Your Honor.

Mr. Van Hoy: No questions on direct.

Court: Thank you, gentlemen. It's about ten minutes to five. Have you got a witness we can finish in twenty minutes or so?

Mr. Van Hoy: Yes, Your Honor. The defendant calls Josiah Butler.

Josia Butler, a witness called by the defendant, having first been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Van Hoy:

Q. Will you state your name and address, please? A. Josiah Butler, 701 East Iowa Avenue, Bessemer City.

[92] Q. Were you on the selection committee that interviewed the plaintiff and Donald Kincaid? A. Yes, I was.

Q. At that time, were you Chairman of the City Recreation Committee? A. Yes.

Q. Do you have prior experience coaching any sports teams? A. Yes, I do.

Q. Will you describe those for the Court, please? A. I was a high school football/baseball coach for six years before I went into private business. I helped run the Optimist recreation program for approximately eight years prior to this time.

Q. Is that in Bessemer City? A. In Bessemer City.

Q. Are you a college graduate? A. Yes, I am.

Q. From what institution? A. Western Carolina.

Q. What was your degree in? A. I had a double degree in Social Studies/Health and Physical Education.

Q. On the selection committee, do you remember how many persons were interviewed? A. They're saying eight. Right now, I can only remember five.

[93] Q. Do you remember how many were male and how many were female? A. Of the five I remember, there were four male and one female.

Q. Was the plaintiff the female you remember? A. Yes.

Q. Were you present for the interviews of all of the applicants for the position who did interview that night? A. Yes, I was.

Q. If you remember, after the interviews were conducted, did the committee have any discussions among itself about who the various people on the committee chose to select?

BEST AVAILABLE COPY

A. Yes. We went over all of the people that we had interviewed. In my opinion, there were pros and cons, and then at that time we narrowed the field down.

Q. Did you personally have a ranked order or an order of selection of the persons that you believed the best suitable for the job, the best qualified? A. Yes.

Q. Can you describe who you thought was best qualified? A. Most qualified, in my opinion, was Bert Broadway. He was at that time Recreation Director at Cramerton.

Q. The Town of Cramerton, North Carolina? A. Yes.

Q. Is that in Gaston County? A. In Gaston County.

Q. What, if anything, did you know about his duties in [94] Cramerton? A. I was on the County Recreation Commission, and I had served as Chairman of the hiring committee for a County Recreation Director, so at the time that we had been interested in getting a Recreation Director in Bessemer City I went back to the County Director and asked him for a recommendation, and he recommended Broadway; and, in turn, I talked to Broadway, and Carl Baber, the County Recreation Director, furnished me some information pertaining to him. I had known him personally through the Optimist-related programs. He had a degree in Recreation from N. C. State and was a working Recreation Director.

Q. If you remember, who was your second choice? A. When . . .

Q. Strike that, Mr. Butler. Did you actually cast your vote for Mr. Broadway when the vote was taken? A. We discussed all of the candidates, and this candidate was eliminated because in our interview he said he would not move to Bessemer City, and we felt that we needed . . .

Court: What do you mean by this candidate?

A. Bert Broadway, who was the Recreation Director in Cramerton.

When we discussed all of the candidates, he said that he would not move to Bessemer City, so he was eliminated. You asked me who was my top choice. He was until he said that he would not move to Bessemer City. At that time, he was eliminated.

Q. Who was your next choice, if you remember? [95] A. Mr. Kincaid was my second choice.

Q. Why were you impressed by Mr. Kincaid? Why was he your second choice? A. He had a degree in Physical Education. He had worked in these Optimist programs that he mentioned himself and, of course, being a PE major I knew the course content that he had to go through to get this degree, and I felt that he had the requirements for the job.

Q. Specifically, what of Mr. Kincaid's qualifications—excuse me, experience working in the Bessemer City programs did you know about personally? A. Well, I was Youth Activity Director of the Optimist Club and, of course, at that time it was my responsibility for organizing all of these programs, and Mr. Kincaid had helped me organize—he also coached, but he had helped me organize the basketball program. He helped me organize it for scheduling. I was giving a lot of time. A lot of times I had to call somebody in to help me, and he had helped me to make out the schedule that year for the basketball program. The thing about it, we had to work our program around getting the school gyms when we could, the Central gym for practicing and the Lincoln Junior High gym for playing the games. We had to work our schedule around their schedule.

Court: Mr. Butler, was Broadway interviewed? He was not interviewed, was he?

[96] A. Yes, sir, he was interviewed. It was at the interview that he stated he would not move to Bessemer City.

Court: I was looking to see if his application was in here and I had not seen it.

Mr. Gibson: I was going to try to clear that up. I referred earlier to some applications and documents we received today. I think through some problems the people who were interviewed were not attached to the interrogatories or provided to us until today, so Mr. Broadway will be in that group.

Court: Okay, go ahead.

Q. You mentioned your own personal involvement in the Optimist Club activities. In 1975, did the Optimist Clubs run the team sports activities in Bessemer City? A. Yes, sir, up until, well, a year or two later, the only youth athletic was run by the Optimist Club. The Optimist Club had basketball, baseball and football for ages 8 through 12 at that time. They had two football teams, six or eight basketball and six or eight baseball. The Recreation Director at that time that we had did nothing, and we had dismissed him, and we wanted somebody who could expand the program, and we were not looking for someone at that time to coach these teams, but we were looking for someone to organize the program and, when you asked me about what the Optimist Club did, we run all of the programs, the athletic programs for youth 8 through 12.

[97] Q. Does the Optimist Club still run the programs? A. We run baseball and football. The City Recreation has taken over basketball and soccer.

Q. What, if anything, do you remember about what you considered about Ms. Anderson's qualifications for the position? A. She showed that she had worked in recreation at—in the past. I had forgotten. I thought she had said Western Carolina Center, but it was Broughton Hospital. She showed that she had a degree in Elementary Education. I didn't feel that the certificate in recreation

which I know, of course, was issued as a result of doing some work, it wasn't an earned degree doing that work in recreation at Broughton; and the diploma in Elementary Education, I didn't feel, would outweigh the degree in Physical Education. I knew in Physical Education you had to have certain courses relating to recreation.

Q. At the time of these interviews, did you know the plaintiff, Ms. Anderson? A. Yes, sir.

Q. Did you know her personally? A. To speak—we were members of the same church.

Q. Did you know her mother? A. Yes.

Q. Do you know her husband? A. Yes.

Q. Did you know Mr. Kincaid? [98] A. Yes.

Q. Before the night of those interviews, do you recollect a conversation with Auddie Boone about the upcoming interviews? A. Not in necessarily a conversation but a statement. My wife and myself were in her shop. I went in with my wife. Of course, it was just a statement that was made that I don't feel like Kincaid ought to have the job because, something along the line of his family has run the town long enough.

Q. Who made that statement? A. Ms. Boone.

Q. At that time, if you remember, had the selection committee already been appointed? A. I believe so. I won't say yes or no definitely but I think so.

Mr. Wallas: Move to strike what he believes, Your Honor.

Court: Allowed.

Q. During that conversation, did Ms. Boone make any other comments about the interviewees or the selection process? A. No, that was the extent of it.

Q. Aside from that conversation, did you converse with anyone on the committee, selection committee, prior to the night of the interviews about the relative merits of the

candidates? A. I don't think I commented to anyone on the Recreation Committee. I did inform the City Manager that Bert Broadway was [99] applying for the job and I briefed him on his credentials. When we went into that meeting, I was convinced that Bert Broadway was the man for the job. In fact, I had informed him of the vacancy and asked him to apply.

Q. If you can remember now, back in 1975, did you deem this Recreation Director's position to be unsuitable for a woman? A. No. I know several women that I would have recommended very highly for the job. I think it is qualifications and experience that would warrant the suitability for the job.

Q. In 1975, did you know any females . . . A. I think at that time I knew of two specifically, had either one of them applied, would have got my vote.

Q. Do you recollect the names of either of these persons? A. Yeah, Hester—I don't know if it's her maiden name or married name—Haynes and Jo Haynes. They are both teachers and, of course, have a Physical Education Degree.

Q. What did you believe were their qualifications for this position?

Mr. Gibson: Objection as to what he believes. Move to strike.

Court: Overruled.

A. I feel they both had received their degree in Physical Education; therefore, they were educated properly. They had the courses to prepare them for the work, and I also know of their participation in phys. ed. in community recreation that would [100] have qualified them for the job.

Q. We have talked about three of the applicants—Bert Broadway, Mr. Kincaid, Ms. Anderson. Do you remember why you personally did not vote to select any of the other applicants? A. Of the other three that I can remember—

like I said, someone said eight. I can only remember five—two of them were local boys. They had no formal education, college education, in this line. They had only participated in athletics. I didn't feel like they were qualified to set up a recreation program, and we were talking about someone coming in that, at that time, could establish a program. We had hired a Recreation Director for a year, but he had done nothing. We were talking about someone coming in and establishing a program, and this was a one-person department at that time. As he said, he had a secretary, but that was it. All of the work and all of the planning had to be done by this one person.

Q. The requirement that the individual who was selected live in Bessemer City that disqualified Broadway, was that a personal requirement or was that a requirement that had been imposed? A. No, nothing was given to us prior to that night. When we interviewed all of the applicants and then they went out, then we began to review the applicants. The five of us, among ourselves, decided we wanted a Recreation Director in Bessemer City.

Q. Do you remember whether any question was asked of any [101] applicants about their amicability to their working at night? A. No.

Q. Their willingness to work at night? A. No.

Q. Do you remember if any applicant was asked about his or her spouse's, husband's or wife's, reaction to working at night? A. Yes, that was asked. It was asked of Ms. Anderson and, in a way, it was asked of Mr. Kincaid.

Q. How was it asked of Mr. Kincaid? A. In the sense that what will your wife and children think about your staying out so late.

Q. Did you personally consider the family duties of any of the candidates in deciding whether you deemed them to be qualified for this position? A. No, sir.

Q. Do you remember who asked the question about family reactions of the various applicants? A. No, sir, I don't.

Mr. Wallas: Objection. Move to strike. There's been no testimony that it was asked of any applicant other than Ms. Anderson and Mr. Kincaid.

Court: Motion allowed. I'll allow the motion to strike for the reason stated.

Q. Do you remember who asked Mr. Kincaid the question about his wife's reaction to his working late at night? [102] A. Yes. Ms. Boone made that reference.

Q. Do you remember who asked Ms. Anderson about her husband's reaction to working at night? A. No, sir, I don't. It very well might have been me. I don't know, but I don't remember.

Q. Did you have a conversation with Auddie Boone about —before the interviews—in which she compared the relative chances of the candidates to get the job? A. Yes. At the time that I mentioned before when I was in her shop, she made the statement that, well, it looks like it's down the tube, Kincaid or Phyllis—or she said Donnie and Phyllis —and that was the time that she made the statement that she didn't feel like Donnie should have the job because of his family. She said his family had run the town long enough, or something to that effect.

Q. Was this before the interviews were held, if you remember? A. Yes.

Q. Mr. Butler, are you married? A. Yes, I am.

Q. Is you wife employed now? A. No. She's disabled. She was a school teacher until she became disabled.

Q. Was she a school teacher any time while you were married? A. Oh, yes.

Q. When did she quit teaching school?

[103] Court: What's the relevance of this?

Mr. Van Hoy: To show the witness is not prejudiced against a wife working at night. The plaintiff made a big issue of that.

Court: Go ahead.

A. I'm trying to think. I think she had to resign her teaching position in '69. She had back surgery in '70 or '71.

Q. If you remember, did her duties when she taught require her to ever work at night? A. Not work but go to PTA meetings and teachers' meetings or something like that.

Mr. Van Hoy: That completes the examination of this witness, Your Honor.

Court: Any cross-examination?

Cross-Examination by Mr. Wallas:

Q. Mr. Butler, I believe you just testified that when you met with Ms. Boone in her shop that she told you that it was down—the choice was between Mr. Kincaid or the plaintiff. Is that right? A. No, this was not a meeting.

Q. When you ran into her? A. I went into her shop with my wife to do some shopping and I was with her. The statement was made that it looks like it would be between Donnie and Phyllis.

[104] Q. What did you say? A. I didn't—the best I remember, I didn't comment because at that time I didn't feel that way.

Q. What did you feel? A. I felt Bert Broadway was the man for the job.

Q. And Ms. Boone was there when Mr. Broadway was interviewed. Isn't that true? A. Yes.

Q. And her opinion was that the man for the job, the first choice for the job was Mr. Broadway. Isn't that true? A. I believe so. I wouldn't state it for sure, what her opinion was at that time.

Q. Didn't you all discuss it and everybody unanimously agreed that Mr. Broadway was the best man for the job but he wouldn't move? A. I don't think it was unanimous, but there was no vote taken. When we discussed the fact among ourselves and when we discussed that, I think we

unanimously agreed that he would not be considered for the job. I don't believe there was any vote taken.

Q. You don't remember what Ms. Boone said about Mr. Broadway? A. No, sir.

Q. And whether she felt he was best qualified? A. No, I don't.

Q. The first time you learned he wouldn't move was at the interview? [105] A. Yes.

Q. Did he . . . A. No, no. I had talked to him the day of the meeting, and we discussed that. I said, well, I think that's going to have a bearing on the thing tonight. So that night I believe I brought up and asked the question because I felt like that would be a factor.

Q. This conversation you had with Mr. Broadway, was that chronologically after you ran into Ms. Boone at her store? A. Yes.

Q. So, Ms. Boone didn't know prior to the interview, as far as you know, that Mr. Broadway wouldn't move? A. No, I don't think anyone knew, and I didn't know for sure.

Q. And your testimony still is that Ms. Boone said it's between Mr. Kincaid and the plaintiff? A. Yes.

Q. And you, in fact, called up Mr. Broadway and told him to apply or suggested he apply for the job? A. Yes, sir.

Q. Did you call up Jo Haynes and suggest she apply for the job? A. No.

Q. Did you call up Hester Haynes? A. No.

Q. You only called one person? [106] A. I called two others—Russ Bergman and I called Roy Pierson. Russ Bergman was teaching. He was a retired Recreation Director, and Roy Pierson was an active Recreation Director in Kings Mountain.

Q. But the two Misses Haynes, you say they were qualified? A. Yes.

Q. But you didn't have any conversation with them? A. No, because there were both—both had teaching jobs.

I didn't feel like—and at that time it would have been a decrease in pay to go from a teaching job to this job.

Q. Do you know what Ms. Anderson's pay was at this time? A. No.

Q. Is that one of the reasons you didn't consider her, because you knew she was a teacher at the time, didn't you? A. Yes.

Q. Do you know what her pay was? A. No, I didn't.

Q. Can you—what was Ms. Haynes being paid at that time? A. I knew what I would have been paid if I had been still teaching with the number of years experience, and both of these women started teaching the same time I did.

Q. So, you felt like . . . A. They would have been in the neighborhood of 10,000 at that time. This job, if my information was correct, was supposed to have been about 8,500.

[107] Q. Did you ask Ms. Anderson what her salary was? A. No. I mean if she wanted to apply, that was her prerogative.

Q. How many women belong to the Optimist Club? A. No women belong to the Optimist Club. The Optimmes is the auxiliary.

Q. And, as I understand it, the Optimist Club was running the, as of March of 1975, the baseball, football and basketball programs? A. Yes, sir.

Q. And that is what you were involved in? A. Yes, sir.

Q. And Mr. Kincaid was involved in? A. Yes, sir.

Q. Do you remember if you had a conversation with him, Mr. Kincaid, to tell him this job was coming vacant? A. I might have. I don't know for sure.

Q. You don't remember? A. I don't remember whether I actually contacted him or told him. I might have. I know we were in close association every day.

Q. From your experience and the kinds of things you were interested in or had been interested throughout your

life, you wanted the baseball, football and basketball programs to be continued and to be strengthened? A. Yes, I wanted them strengthened. I wanted the Recreation [108] Department to help with some of the planning, not in actual running the program, though. I felt that we were running the program but I wanted help in financing, facilities and planning. As I said, we were still running the programs, as far as the actual operation of these programs, except the basketball.

Q. Did you know exactly what courses Mr. Kincaid had taken? A. I didn't know the exact curriculum but, being a PE major, I had an idea, I think, a very well educated idea as to his curriculum because there is a set curriculum that a PE major must go through.

Q. To your knowledge, at the time of the interview had Mr. Kincaid ever supervised any employees? A. I didn't think that was important at that time because the Recreation Department was a one person operation.

Q. So, your answer is that as far as you know he had not? A. No.

Q. But it was not important? A. It was not.

Q. To your knowledge, had he ever prepared a budget for anything? A. No, but he'd had the courses to prepare him to do so.

Q. Did you ask Ms. Anderson if she had prepared budgets? A. No.

Q. Did you ask her if she had courses in preparing budgets? A. No. She said she had had business courses in school, so [109] I assume any business course would be preparing you for things like that.

Q. Is it a fair statement, Mr. Butler, that a lot of what your decision was was based on assumptions you had about what Mr. Kincaid knew and what Ms. Anderson knew? A. What was put before us was the fact that he had a Phys. Ed. Degree. She had an Elementary Education Degree. He had worked in recreation programs with youth.

He had done his practice teaching in phys. ed. She had done recreation work at Broughton Hospital.

Q. And worked 20 years in various jobs? A. In various jobs but none of them pertaining to recreation except that job at Broughton.

Q. What job had he had in recreation—that is, Mr. Kincaid? A. He had been involved in athletics and recreation all of his life.

Q. What job had he had in recreation? A. No jobs other than the practice teaching but he had four years of college preparing him for this.

Q. You say that a question was asked Mr. Kincaid about whether his wife and children would be happy if he worked at night? A. I don't know whether it was a question or not, but it was an inference—how will your family feel about this, or how will your wife and children feel about this.

Q. How many kids did Mr. Kincaid have at that time? [110] A. I think one.

Q. Are you familiar with his children? A. I knew he had children. He was married awhile before he went to college.

Mr. Wallas: That's all we have, Your Honor.

Mr. Van Hoy: No redirect.

Court: Thank you, Mr. Butler. What is your guess about how long the rest of the case will take, Mr. Van Hoy?

Mr. Van Hoy: I would imagine an hour and a half, two hours.

Mr. Whitesides: I think about two hours.

Court: Okay. I think you all have been pretty efficient in terms of the way you have handled the questioning. I always growl a little. I think it's been right well tried so far. Okay, we'll take a recess until 9:30 tomorrow morning.

Transcript of Proceedings, September 14, 1982

OVERNIGHT RECESS

September 14, 1982

Court: I believe we had concluded examination of Mr. Butler.

Mr. Gibson: Yes, Your Honor.

Court: Call your next witness.

WILLIAM HAROLD MCCLELLAN, a witness called by the defendant, having first been duly sworn, was examined and testified as follows:

Direct Examination [111] *by Mr. Van Hoy:*

Q. Will you please state your name and address? A. William Harold McClellan, 106 West Main Avenue, Bessemer City.

Q. Mr. McClellan, were you on the 1975 selection committee that selected someone for the Recreation Director's job? A. Yes.

Q. Speaking of you personally, what criteria did you consider in deciding which applicant you preferred for the position? A. I considered their education and the programs that they presented to the committee about what they had in mind for the Recreation Department.

Q. Did you personally have any experience of your own with the City's recreation program? A. Well, I was appointed to the City Recreation Committee approximately a year or so before this, but I was with the—wasn't connected with the City—United Fund. They had a center there for recreation and I was over it.

Q. Were you still a member of the City Recreation Committee at the time of the interviews of the applicants? A. Yes.

Transcript of Proceedings, September 14, 1982

Q. Tell me how you personally judged the qualifications of Mr. Kincaid. What did you like or not like about him? A. Well, his—he had a degree in Physical Education and the background that he gave on his education and what he had in mind [112] that the city needed for its recreation, the programs.

Q. At the conclusion of the interviews, was there a vote taken by the committee members? A. Yes.

Q. For whom did you cast your vote, if you remember? A. Mr. Kincaid.

Q. Do you remember anything about the qualifications of the plaintiff, Phyllis Anderson? A. Yes.

Q. What do you remember about her qualifications? A. Well, she stated she had a certificate from the State and that she was a college—she had a college degree in Education and that she had worked in this program with, I believe, Broughton Hospital, and she gave pretty much the same programs that she had in mind. They were pretty well the same as Mr. Kincaid's.

Q. Can you tell the Court why you voted for Mr. Kincaid when it came time to make a recommendation? A. Because he had a degree in Physical Education.

Q. Did you approach anyone else on the committee prior to the time of the interviews to discuss the various applicants? A. No.

Q. You indicated Mr. Kincaid was your first choice, was the choice you voted for. Was he your first choice for the position among those who were interviewed? A. Not among the ones that had interviewed, but Mr. Broadway, [113] as far as I was concerned, he had already eliminated himself when he said he wouldn't relocate.

Q. If you remember, when did you find out Mr. Broadway would not relocate? A. I'm not sure. I think it was at the time of the interview.

Q. Are you married, Mr. McClellan? A. Yes.

Q. Is your wife employed? A. Yes, she is.

Q. Would you tell us where she is employed? A. With Greensboro Manufacturing in Bessemer City.

Q. Is that a textile plant? A. Yes, it is.

Q. How long has she been employed there? A. Fifteen years.

Q. If you know, has she ever worked on a night shift in that position? A. Yes, she worked approximately ten years.

Q. Was that after the time you all were married? A. Yes.

Mr. Van Hoy: The witness is available for cross-examination.

Mr. Gibson: May we have a moment, Your Honor?

Cross-Examination by Mr. Gibson:

[114] Q. Mr. McClellan, Mr. Broadway was your first choice. Is that your testimony? A. Yes.

Q. And is it also your testimony that your chose Mr. Kincaid because of his education? A. Yes.

Q. So, I take it from your testimony that education was the primary focus? A. It was the main reason for my decision.

Q. Did you know during the interview that Mr. Broadway did not have a degree in PE?

Mr. Van Hoy: I object. That assumes a fact not on the record.

The Court: Objection is sustained to the form of the question.

Q. Do you know whether Mr. Broadway had a college degree in '75 in Physical Education? A. I don't remember.

Q. Mr. McClellan, I show you what has been marked as Plaintiff's Exhibit 19 and ask you to look at it and tell me

if it's a letter from Mr. Broadway to Mr. Metcalf with a resumé attached. A. Yes, it seems to be.

Q. Under the section on the resumé entitled Education, does it not say attended Appalachian State University and Gaston College, took five electives in Physical Education? [115] A. Which one?

Q. Under Education right here. A. Yes, it does.

Q. And you have examined this resumé and you don't see anywhere on there that says he had a degree in Physical Education or Recreation? A. No, sir.

Q. Thank you. Mr. McClellan, was Mr. Broadway Ms. Boone's first choice, as best you can remember? A. I don't remember.

Q. Mr. McClellan, there were no qualifications or criteria for selecting the Recreational Director given to you, were there? A. No.

Mr. Gibson: That's all we have, Your Honor.

Mr. Van Hoy: A little bit on redirect, Your Honor.

Redirect Eximnation by Mr. Van Hoy:

Q. What, if anything, did you personally know about Bert Broadway's qualifications for the position? A. His experience in recreation, I believe it was, with the Cramerton Recreation Department.

Q. If you know, what was that experience? A. I don't know. I don't remember. I just know he was in recreation.

[116] Q. Do you know what position he held? A. He was Director, I'm pretty sure.

Q. Is Cramerton a town in Gaston County? A. Yes.

Q. If you know, about how far is it from the Town of Bessemer City? A. Approximately 15 miles.

Mr. Van Hoy: That's all, Your Honor.

Mr. Gibson: No questions, Your Honor.

Transcript of Proceedings, September 14, 1982

FRANK EUGENE NICHOLS, a witness called by the defendant, having first been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Van Hoy:

Q. Will you state your name and address, please, sir? A. Frank Eugene Nichols, 104 Skyland Drive, Bessemer City.

Q. Is that Bessemer City, North Carolina? A. Yes.

Q. Were you a resident of Bessemer City in 1975? A. Yes, sir.

Q. Were you on the selection committee to pick a Recreation Director? A. Yes, sir.

Q. Were you at that time on any boards or committees of the City Government there? [117] A. No.

Q. Were you on the City Recreation Commission? A. Yes.

Q. Or Committee? A. Yes.

Q. Which was it, Committee or Commission? A. Committee.

Q. What, if any, personal experience have you had in running a recreational program? A. Well, I was Youth Director in the Optimist Club, and for about four years before 1975 Joe Butler and I just about ran the Recreation Department for the City. We didn't get any pay for it but we did it. We looked after the baseball, football, basketball, lined the fields off, helped out at ballgames, helped officiate at basketball games, and et cetera like that.

Q. Were you present at the interviews that were conducted with the applicants for the Recreation position? A. Yes.

Q. Prior to those interviews, did you personally approach anyone else on the committee in behalf of one or more of the applicants? A. No, sir.

Q. Did anyone approach you? A. No, sir.

Transcript of Proceedings, September 14, 1982

Q. Who was your personal selection when the committee voted [118] for that position, if you remember? A. The best I can remember, the only guidelines we had to go on before the meeting started, we did say that the person that got the job would have to live in Bessemer City; and, the best I can remember, in the interview with Mr. Broadway he specified that his wife was going to UNC-Charlotte and it was impossible for him to move to Bessemer City, and he said he would move to Bessemer City after she graduated from college, but we wanted someone there because we expressed at this meeting—in the interview—that this wasn't a 9 to 5 job, that it would be a 24-hour a day job, because we wanted someone to set up a recreation program for Bessemer City and get it started, and we thought the person that we hired should live in Bessemer City.

Q. Were you present when the committee voted? A. Yes, sir.

Q. Who did you cast your vote for? A. Mr. Broadway, to start with. I think everybody but Ms. Boone—Mr. Broadway would have gotten the job if he had moved to Bessemer City, and my second choice was Donnie Kincaid.

Q. If you remember, why was your second choice Donnie Kincaid? A. On account he had a PE major and had a college degree, and he had a background in activities in sports, recreation.

Q. Were you present for the testimony yesterday here? A. Yes, sir.

Q. Did you hear the questions asked about one or more applicants [119] being asked about family reaction to taking this position if they were offered it? A. Yes, sir.

Q. Do you remember if you were the person that asked that question? A. I can't remember for sure. I may have been but I can't remember.

Q. Do you remember a question like that being asked of any of the applicants? A. Yes, I sure do.

Q. Do you remember if that question was asked Ms.

Anderson, the plaintiff? A. I'm pretty sure it was asked to everyone, about long hours, that this job would consist of long hours, being away from home at night. The best I can remember now, I'm stating that we did ask all the application—people that had their application in, people we interviewed that night.

Q. Did you have any basis for believing that the job required long hours and night work? A. Sure. I'd done it. I knew it did.

Q. Tell us how you knew that. A. I've done it. I went to the gymnasium at 12 o'clock on Saturday and got home at 11 o'clock that night.

Q. Was this through your activities with the Optimist Club that you described? [120] A. Right.

Q. Do you remember what you considered about the qualifications of Phyllis Anderson for this position? A. We considered her. We talked . . .

Q. I'm talking about you personally. Do you remember what you considered? A. Personally, she was third on my list. She was third for qualifications.

Q. What did you deem to be her qualifications, if you remember? A. Well, she had stated at that meeting that she had—did some recreation work at Broughton, setting up games for the patients and things like that; and I think she said she'd had some experience in public speaking.

Q. Mr. Nichols, if you remember, why did you personally prefer Donald Kincaid over Phyllis Anderson as your selection for this position? A. I figured he was better qualified.

Q. In what sense? A. He had a PE degree.

Q. Anything else? A. At the time that we were talking about getting this recreation program started at Bessemer City, a lady could have run the job. I'm not saying she couldn't, but it would have been real hard.

Q. At the time of those interviews, did you know Phyllis Anderson personally? [121] A. Yes.

Q. Did you know Donnie Kincaid personally? A. Yes.

Q. Are you married? A. Yes.

Q. Does your wife work? A. Yes.

Q. Where does she work? A. She worked 20 years at Warner-Swasey. She was laid off two weeks ago.

Q. What sort of business is Warner-Swasey, if you know? A. It's a machine company, makes machines.

Q. Any of that 20 years of her employment with Warner-Swasey been while you were married to her? A. All of it.

Mr. Van Hoy: The witness is available for cross-examination.

Court: Cross-examination?

Cross-Examination by Mr. Gibson:

Q. Mr. Nichols, you say that you preferred Mr. Kincaid over the plaintiff because of the better qualifications? A. Yes, sir.

Q. And that was because of his PE degree? A. Yes.

[122] Q. You also say Mr. Broadway was your first choice? A. Yes.

Q. Does that mean you thought he was better qualified than Mr. Kincaid? A. Well, I had talked to people in Cramerton and was coaching some of the teams and going to Cramerton to see the setup in Cramerton, and people in Cramerton were saying he was doing a good job.

Q. So, you're saying experience was the reason you preferred Mr. Broadway? A. Yes.

Q. And Mr. Kincaid didn't have any experience at the time you hired him? A. Except what he got in college, that he received in college, preparing himself for the job.

Q. Mr. Van Hoy asked you about your personal experience running a recreation program. Is that right? A. Yes.

Q. You told him that you had run a recreation program for the Optimist Club? A. Yes.

Q. And that included organizing baseball, organizing the leagues and the games? A. Joe Butler and I, yes, sir.

Q. And that included organizing games in basketball and football. [123] Is that right? A. Yes, sir.

Q. And included lining fields and that sort of thing? A. Yes, sir.

Q. And that's what you were concerned about in terms of a Recreation Director, someone who could run football and basketball? A. That is just part of it.

Q. Now, Mr. Nichols, your emphasis was on these traditional male sports. Isn't that correct? A. No, sir.

Q. In fact, you referred to this job as an Athletic Director? A. Let me interrupt you a minute.

Q. Answer the question, Mr. Nichols, please. A. Repeat it, please.

Q. You referred to this job as an Athletic Director. Is that correct? A. The City Recreation Director, Athletic Director.

Q. Mr. Nichols, may I show you your deposition, which has been marked as Plaintiff's Exhibit 3? Do you remember taking your deposition and my asking you some questions under oath? A. Yes, sir.

Q. Now, on Page 7 at Line 14, I asked you a question. The question was, "Would you describe how you went about distinguishing or ranking one candidate above another candidate to fill the [124] job?" And your answer, "By listening to them. In my mind, I had what I thought a good Athletic Director for the City would be." That was your answer, wasn't it? A. Yes, sir.

Q. You referred to the Recreation Director as an Athletic Director? A. Yes, sir.

Q. And your emphasis was on traditional male sports?

Mr. Van Hoy: Objection to the characterization.

Court: Overruled.

A. May I say something, Judge?

Court: Well, you have a question before you. Do you remember the question?

A. No.

Mr. Gibson: I'll withdraw the question that was objected to.

Court: I overruled the objection. Who wants to ask or answer the next question?

Mr. Gibson: I will ask the next question, Your Honor.

Q. Now, Mr. Nichols, you say it would have been real hard for a lady to be Recreation Director. Is that right? A. Yes, sir.

Q. So, during that interview, you wouldn't want to put a lady in that position, would you? A. I would, yes, sir. I knew some ladies that I would have.

[125] Q. You wouldn't want your wife to have that job, though, would you? A. No, sir, I wouldn't.

Q. And you wouldn't want to put a lady through lining ballfields and being at the gym at night? A. I'm speaking personally for myself. I have three children at home, and I think my wife should be at home at night.

Q. I believe your testimony when Mr. Van Hoy asked you some questions was that it would be real hard for a lady. My question is you wouldn't want to see a lady in that situation, would you? A. If she was qualified, yes, sir.

Q. You were not given any guidelines or instructions on how you would go about filling this position. Is that right? A. That's right.

Q. Did you tell Mr. Kincaid to apply for this job? A. No, sir.

Q. Did you have any discussions with Mr. Kincaid prior to the interview? A. No, sir.

Q. But you had worked with Mr. Kincaid in the Optimist Club program? A. No, sir.

Q. He hadn't coached a team over there while you and Mr. Butler were running the league? A. Not for me, no, sir.

[126] Mr. Gibson: No further questions, Your Honor.

A. May I say one other thing, Your Honor?

Court: All right.

A. I coached—you're talking about male dominance in these sports. Several years that I coached there in Bessemer, I had five young ladies playing ball for me, baseball, and I have been a supervisor in the textile industry for 28 years, and I've worked 35 women for 28 years, and I sure wouldn't discriminate against any lady.

Mr. Van Hoy: No questions on redirect, Your Honor.

Mr. Gibson: No further questions.

Mr. Whitesides: Judge, may we approach the bench?

Court: You may.

(Conference out of the hearing of the court reporter)

TIMOTHY R. HELMS, a witness called by the defendant, having first been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Van Hoy:

Q. State your name and address. A. Timothy R. Helms, 202 West Gaston Avenue, Bessemer City, North Carolina.

Q. Mr. Helms, are you presently employed? A. Yes, sir, I am.

Q. Where are you employed? [127] A. Kings Point Knitting Mills, Bessemer City.

Q. What is your job title there? A. Several job titles. The general job title that would cover me right now would be Administrative Manager, which includes Office Manager, Personnel Director, Industrial Relations Director, Manager over the shop, the shipping. I think that pretty well covers it.

Q. Are you in charge of the personnel functions? A. Yes, sir.

Q. How long have you had that responsibility? A. Six years with Kings Point Knitting Mills.

Q. Prior to that, what was your position? A. Industrial Relations and Personnel Director and Corporate Secretary for McBest Industries, Bessemer City, North Carolina, and in High Shoals, North Carolina.

Q. Are you a member of the City Council of Bessemer City? A. Yes, sir, I am.

Q. Were you a member of the City Council in 1975 when the selection of a Recreation Director was done? A. Yes, I was.

Q. Have you been on the City Council from '75 through the present time? A. Yes, sir.

Q. Were you personally on the selection committee to choose a Recreation Director? [128] A. Yes, sir.

Q. Is this in 1975? A. Yes, sir.

Q. Were you present at the interviews of the applicants for that position? A. Yes, sir, I was.

Q. For all of them? A. Yes, sir.

Q. Prior to those interviews, did you approach anyone else on the committee about who should be selected for that position? A. No, sir, none whatsoever.

Q. Do you remember who you personally believed should

get the position? A. During the selection process, after the interview, I felt very strongly about Mr. Broadway, other than his stipulation not to move to Bessemer City; second choice being Donnie Kincaid. I didn't really rank anybody after that.

Q. About Mr. Kincaid, why was he your second choice, if you remember? A. Mr. Kincaid made a very good presentation, if I remember correctly, that he was very enthusiastic. He put forth a very good program that he would develop with the recreation program in Bessemer City, a cradle-to-the-grave type program to include everyone in the community, a very, very, very varied type program that would include dance, the traditional recreation [129] type sports. It would include just anything that the people in Bessemer City would like to do that there were enough people interested in doing—square dancing to clogging to ballet to bridge to just the entire gambit of what a recreation program should be about, a very good presentation.

Q. You've said you're still on the City Council. If you know, did Mr. Kincaid implement any of the programs he talked about? A. Absolutely, 100 percent. We had a very enviable recreation program in Bessemer City.

Q. At the time of the interviews, what, if anything, did you know about his education? A. At the time of the interviews?

Q. Yes. A. I knew that Mr. Kincaid was a graduate of Appalachian State with a PE major.

Q. What, if anything, did you know about any prior recreation experience he may have had? A. I knew Mr. Kincaid had worked briefly in the City Optimist or the Optimist programs there in town, coaching and so forth.

Q. Do you recollect the committee's interview with the plaintiff, Phyllis Anderson? A. Yes, sir.

Q. Was there anything about that interview that impressed you either favorably or unfavorably? A. Yes, sir.

[130] Q. Tell the Court what that was. A. Initially in the interview, most of the applicants either made a statement or read the resumé or gave their qualifications, and I remember either the letter being read or a statement being made by Ms. Anderson. It was a very negative type statement that indicated she would not be hired simply because she was a woman.

Q. Do you remember any of the credentials or qualifications she asserted for the job, personally? A. Yes, I remember she had worked in the Broughton facility in Morganton, North Carolina, in a recreation capacity. I knew she had worked in the elementary education field, and that's basically what I remember of her qualifications at that time.

Q. Did you personally deem Mr. Kincaid's qualifications to be superior to those of Ms. Anderson's? A. Mr. Kincaid's qualifications and his presentation, yes, sir.

Q. What specifically about his qualifications did you personally deem to be superior to those of Ms. Anderson? A. That he was specifically trained in the field of physical education and that he did have a degree in that field.

Q. At the time of these interviews, did you know personally Bert Broadway? A. No, sir.

[131] Q. Did you know personally Donnie Kincaid? A. No, sir.

Q. Did you know personally Phyllis Anderson? A. No, sir.

Q. Did you see the letters of application and resumés of the various candidates before the interviews? A. I'm not real sure on that. I don't know if I had them in my hands during the interview. Ms. Boone was sitting on my right. If I remember correctly, I think Ms. Boone either had copies or I had copies of the resumés during the interview. I don't remember having them before the interview.

Q. Do you remember why you did not vote for any of

the other applicants? A. I just didn't deem them qualified at all.

Q. Do you remember any specifics about who had what qualifications or lack thereof? A. No, sir. I remember that a couple of the applicants were just a couple of nice fellows that had lived there in the community and had played sports, but that did not qualify them, in my opinion, for a recreation position.

Q. Did you personally consider residency in Bessemer City to be a necessary qualification? A. Yes, I did.

Q. Was that a self-imposed requirement, or had somebody told you that was a requirement? [132] A. In working with the City Council as a member at that time, I remember getting a consensus or opinions from the other council members that it needed to be a criteria that someone lived there in town, due to the previous experience with the previous Recreation Director who had not lived in town.

Q. You referred to Ms. Anderson's experience at Broughton Hospital. At the time of that interview, were you aware of the duration of that experience and when it had occurred? A. I'm sure I was during the interview. I don't remember now. I don't remember the duration. I don't think—grasping as best I can, I think it was a very brief—it was not a long period of time, if I remember correctly.

Q. After the interviews were concluded, was there any discussion among the selection committee members about the relative merits of the applicants? A. Yes, sir.

Q. Do you remember any comments during that discussion by Auddie Boone? A. Yes, sir. Auddie sat on my right and kept telling me the only reason we weren't considering Ms. Anderson was because she was a woman. I told Auddie that it was irrelevant whether Ms. Anderson was a woman or not, but Auddie was very audible about that.

Q. During that discussion, did anyone else make any sort, if you remember, any sort of comments about preference for an [133] applicant, any applicant, because of a particular sex? A. No, sir.

Q. Are you married? A. Yes, sir.

Q. Is your wife employed? A. No, sir.

Q. Has she been employed since you were married? A. Yes, sir.

Q. In what job? A. My wife is a registered nurse. When we first got married, she worked at Columbia Hospital, Columbia, South Carolina, on a rotating shift basis the first year we were married.

Q. Since the time you were married, did she ever work at night? A. Yes, sir.

Q. One final question. Did you determine personally, come to a personal conclusion that Mr. Kincaid's qualifications for the recreation position were superior to those of Ms. Anderson? A. Absolutely.

Q. Why did you conclude that? A. Because Mr. Kincaid had the educational background . . .

Court: Hasn't he been over all of that the last ten minutes?

Mr. Van Hoy: I'm not sure if I asked him that specifically. I know I asked the other folks.

Court: Don't repeat what you've already said, but if [134] there is anything you haven't said you may . . .

Mr. Van Hoy: I'll withdraw that question, Your Honor. The witness is available for cross-examination.

Cross-Examination by Mr. Wallas:

Q. Mr. Helms, you have in personnel—with respect to your employment, you worked with personnel matters a number of years? A. Yes.

Q. Have you ever dealt with the EEOC in cases arising out of the company you work for? A. There was an EEOC case pending with the company that I now work for prior to my joining them, yes, sir.

Q. Did you represent the company in that matter? A. Yes, sir.

Q. Let me show you what's been, I believe, introduced into evidence as Exhibit #11, identified as Mr. Kincaid's application and his resumé, and also let you see Plaintiff's Exhibit 10, which is Ms. Anderson's application and resumé. Let me put both of those before you. If I might, sir, first with respect to Number 11, Plaintiff's Exhibit 11, Mr. Kincaid's application, were there any other documents Mr. Kincaid provided to the committee that you recall at the time he was interviewed? A. No, sir, not that I remember. I don't even remember this one.

Q. Okay. Ms. Anderson presented her program, did she not, of [135] the kinds of things she was interested in doing if she received the Recreation Director job? A. Yes, sir, she did.

Q. In fact, she presented some written, some type of paperwork showing the layouts or guidelines she had prepared for various recreational activities, didn't she?

Mr. Van Hoy: Objection. It assumes a fact not in evidence.

Court: Objection's overruled.

A. I don't remember.

Q. Let me show you your deposition. You remember being disposed in this case on November 24, 1981? A. Yes, sir.

Q. Mr. Gibson asked you a question, looking at Page 12 of that disposition. I believe you were talking about the interview of Ms. Anderson. "What else do you remember"—this is Line 22. "What else do you remember

of her interview?" And your answer was, "I remember that Ms. Anderson in putting forth her qualifications had done some type of paperwork, drawing up plans or something to that nature, about recreation at some school she had attended somewhere, layouts or guidelines or something for various recreational activities." A. Right. It's a poorly structured sentence on my part. What I'm saying in that sentence is that, yes, sir, I do remember having paperwork from Ms. Anderson, such as I have got from Ms. [136] Anderson right now in front of me. I remember she had worked in a facility, Broughton, doing layouts and paperwork and setting up recreation programs of that sort. I'm not referring to the paperwork I had in front of me at the time.

Q. You've got me confused. You're saying she didn't present any plans to you? A. Not that I remember. I remember she made plans at the facility she worked at.

Q. Now, with respect to the guidelines, such as they were, that you received from the City Council, as I understand it, the only qualifications or job description or guidelines that you understood when you went into those interviews was that the person had to reside or end up residing in Bessemer City. Is that correct? A. That was a preference, yes, sir, but that was the only guideline, correct.

Q. And, as I understand it, you testified that Ms. Anderson at the beginning of her interview either made a statement or read a portion of Plaintiff's Exhibit #10 stating that she felt like the committee was going to give strong consideration to a male and not a woman. Is that . . . A. Yes, basically.

Q. You don't remember whether she read this letter or not? A. No, sir.

Q. Did you ask her any follow-up questions about that? [137] A. No, sir.

Q. You didn't have any curiosity as to why she made that statement? A. No, sir.

Q. Now, as I understand the way this committee operated, Mr. Helms—correct me if I'm wrong—each person on that committee had a vote as to who they wanted to recommend to hire. A. Yes, sir.

Q. And you don't know what went through the minds of the other folks or what criteria they used, do you? A. No, sir.

Q. So, all the testimony you've had in this case is simply about how you made your particular decision. Is that right? A. Yes, sir, other than the decision making process at the end where we did discuss the candidates.

Q. Was Mr. Broadway the first choice of everybody? A. I can't remember that, sir. He was my first choice.

Mr. Wallas: That's all the questions we have, Your Honor.

Court: Any redirect?

Mr. Van Hoy: No, sir.

Court: You can come down.

Mr. Van Hoy: The defendant rests, Your Honor.

Court: Any further evidence for the plaintiff?

Mr. Gibson: May we have a minute, Your Honor?

[138] Mr. Wallas: We would move into evidence Exhibit 8, which is the duties of the Recreation Director; Exhibit 15, the May 1, 1975, letter from the City Manager to Mr. Kincaid; and Exhibit 19, which is Mr. Broadway's application right here. I don't think the clerk—this is the only copy we had. We'll need to make some copies of that.

Court: What is Exhibit 8?

Mr. Wallas: That was—that's it right here.

Court: That is the June or May undated—that's Exhibit #A originally and now it's 8?

Mr. Wallas: I believe that was attached to the answers to the interrogatories or something, and that's how it got the A on there.

Court: Gentlemen, let me be sure I understand where we are. Yesterday, if my memory is right, I received in evidence every exhibit that the defendant had identified, subject to any specific objections that might be made. Is that right?

Mr. Wallas: I don't think the defendant introduced any exhibits. You mean the plaintiff, don't you?

Court: No. I tried a case yesterday morning. I guess it was that case in which I admitted all exhibits, subject to a particular ruling. So, all the exhibits you're offering are plaintiff's exhibits with the plaintiff's numbers on them?

Mr. Wallas: Yes, sir. I want to make sure. I've got my list.

[139] Court: I've been looking at all these papers. You want to take the whole batch and see if they are all in evidence?

Mr. Wallas: I'm checking with Mrs. Leazer's list to see if she and I agree that we have the same ones in, and we do. I assume you have got them all up there, Judge, but I'll be glad to do that, Judge.

Court: I don't believe I have seen the applications or any of the people that were interviewed except the plaintiff and Kincaid.

Mr. Wallas: That's the only other one that's in evidence.

Court: You now have Broadway?

Mr. Wallas: Yes, sir. This is all the exhibits right here, Judge.

Court: Okay. How long do you want to address the jury? They don't even hear me when they're talking to each other.

Mr. Wallas: Sorry, Judge.

Court: I asked a question. See, I'm not like—who is that fellow that says I'm Merrill Lynch—E. F. Hutton and when I speak don't nobody listen.

My question was, Mr. Wallas, how long you want to address the jury.

Mr. Wallas: We would propose to let Mr. Gibson open with about ten minutes and then leave it with the defendants and let me close about ten minutes.

[140] Court: That's an awful lot of talking. Can you do it in less than that?

Mr. Wallas: Well, we've come all this way after all these years. We want to say what we want to say. We'll do it as quick as we can.

Court: How long do you want to talk, Henry?

Mr. Whitesides: I was reminded of what my friend said. He said I think I can control myself within the amount allowed by the statute.

Mr. Van Hoy: About a five or ten-minute summation.

Court: I would be helped by some summation, review of the evidence by both sides. I would like to hear a review of the evidence by both sides, plus anything else you want to say.

Mr. Gibson: Your Honor, as I indicated at the beginning of the evidence, this is a disparate treatment case covered by the Burdine and McDonnell-Douglas analysis set forth by the Supreme Court. I think we can quickly go through that Ms. Anderson applied and was qualified and she was rejected under circumstances which give rise to an inference of discrimination. I think the focus goes now to the defendant's articulated reasons for her rejection and whether we have shown or whether the evidence shows that that was pretextual.

Court: How do you get to that position so suddenly?

Mr. Gibson: Well, as a part of the evidence offered [141] on the plaintiff's initial case, Ms. Boone testified that it was her impression that they wanted

a man for the job because of the emphasis on the physical nature of the job. Ms. Anderson testified that they asked her about her husband and her family, how they would feel about her taking a job like this. I don't think that meeting that initial burden is one that is terribly difficult. I believe we met it based on that evidence. I think the plaintiff also brought out some additional inferences of discrimination during the evidence offered by the defendants on cross-examination, and I think that under the whole Burdine . . .

Court: Let's skip Burdine now. I want to hear you talk about the evidence that you say supports the finding that the reason she was not hired was because she was a woman instead of a man. That's the first step in this analysis you're talking about. I want you to review that for me. I remember what you just said, and I've got it recorded in my mind and on paper, but is there any other evidence that I need to be aware of in order to decide the first question? I hear you say there is enough evidence from which a Court could find discrimination based on sex. Is there any more evidence on which basis the Court should find?

Mr. Gibson: In addition to the factors I've set forth—I'm not sure if the Court is limiting me now to what was presented in the plaintiff's case.

Court: No, no. If I understand the legal framework, [142] I don't want to hear about Burdine and McDonnell-Douglas until I hear the evidence which favors the plaintiff's case. That's what your first job is. Tell me what you proved which ought to persuade the Court that she was not hired because she was a woman. That is Step 1.

Mr. Gibson: The entire selection procedure was subjective, and the committee members applied their

own criteria. I think we have shown that individual committee members applied, well, for example, Mr. Butler and Mr. Nichols emphasized the physical nature of this job, and that was subjective criteria that the two of them applied on their own. They did not follow any kind of guidelines or criteria for comparing the qualifications of the applicants. When they talk about Mr. Kincaid, they say education was important, but then they say our first choice was Mr. Broadway, and they say experience was important. Now, Mr. Kincaid didn't have any experience, it was limited to working with the Optimist Club which was scheduling some ballgames, perhaps coaching some ballgames. That, we submit, is not evidence of—that's not experience.

Ms. Anderson was more qualified than Mr. Kincaid for several reasons. (1) She had experience working in a recreation setting. Her general broad experience as a teacher and in her other jobs prepared her to carry out the duties that the job consisted of. Now, when Mr. Kincaid was testifying about his [143] various job duties, all that was not before the committee at the time. We're basically talking about things like organizing, planning, supervising, and that sort of thing, not the kinds of things you take courses in in college. So, we submit Ms. Anderson was clearly better qualified for the position and that the committee members essentially justified their decision to hire a man while on the one hand relying on education when talking about Kincaid and on the other hand relying on experience when it's time to talk about Mr. Broadway. That's all I have, Your Honor.

Mr. Van Hoy: Your Honor, the plaintiff alleges that a male with less or fewer qualifications than her was selected for this position. This is what the

evidence on the record shows: (1) Experience—she had one year recreation experience in 1956, some 19 years before she applied for this position. In contrast to that, Mr. Kincaid, the male who was selected for the position, directed, worked and participated in the Recreation Department there in the very city in the very facilities that he would later supervise, if he were to get the position, for most of his life. As to education, she had a teaching degree. There was some question about whether she had that degree in 1975. She had a teaching degree, experience as a teacher. Compare that to Mr. Kincaid. Mr. Kincaid had, also, a college degree, specifically in Physical Education and specifically of which the curriculum included courses in setting up and administering [144] the necessary parts of a Recreation Department—the purchasing function, the coaching function, umpiring, team sports, the various other matters that he testified about that he took in his college courses.

Back to experience again, Ms. Anderson said she raised money for sports teams, and that was about the extent of it. We believe the record will show that as far as her experience in recreation activities, apart and aside from something twenty years in the past of some limited nature which may or may not have had much to do with recreation, twenty years before in Broughton Hospital. In contrast, Mr. Kincaid had played on local sports teams, coached sports teams, which is an integral function of this position, and had been a student teacher not just teaching people generally about general subjects, academic or otherwise, but specifically a student teacher in a physical education curriculum in Tennessee and, in addition to that, as an apprentice in the local school system in Boone while he was at Appalachian State.

Court: You're talking about practice teaching?

Mr. Van Hoy: Practice teaching at Mountain City, Tennessee. In addition to that, the apprenticeship or assistance of the local sports coach there in Boone, Watauga High School, which was also testified about. So, if you compare qualifications we submit that the conclusion of each individual committee member, who voted for Mr. Kincaid, that he was better qualified is clearly [145] supported by the record.

You next get to another level in the final analysis. Despite what they say, was there any direct evidence that any of them had preselected Mr. Kincaid because of a bias in his favor, which may have been sexually related, or that there was any direct evidence of sexual bias, and the answer as to each of these individuals, with the exception of Ms. Boone, is no. Ms. Boone relies on womanly intuition. Aside from that and the obvious sexual overtones from that, there is no sexual preference expressed. In fact, it has been specifically denied by each of the individuals, and there is nothing to imply it either. It's denied by all these folks that they voted for Kincaid by reason of sex. The plaintiff offered no proof to the contrary.

The famous question about the spouse's reaction to the position, if it were asked—I'm not sure it has been proved. It's certainly a matter for resolution of credibility on your part, whether the question was asked at all of Ms. Anderson; however, Ms. Anderson's own witness says she asked a similar, if not identical, question of Mr. Kincaid.

Mr. Kincaid was not preselected for the position. Each witness has been asked whether there was any lobbying done by them on behalf of other persons, Mr. Kincaid or anyone else, prior to the meeting of the committee. Each one of them has denied it.

There is no evidence to the contrary. If anyone's mind was made up before the meeting, we submit it was the mind [146] of Ms. Boone, the one who voted for the plaintiff, by the comment she made to another person on the committee—I can't vote for Mr. Kincaid because his family has run the town long enough—certainly not a proper criterion. It certainly relates to her credibility about whether she had a reason to believe there was sex discrimination involved in the selection process, in the minds of the other folks. On that specifically, when she was queried about what specific belief or reason for believing do you have that there were sexual stereotypes, sexual bias applied to this, she said that she didn't have any, aside from this womanly intuition.

The plaintiff filed the charge and testified that she did under several mistakes of facts and has brought the lawsuit under several mistakes of facts, including the following: Her belief at the time the interviews was conducted and when she filed the charge in the lawsuit that the job was being held open for Mr. Kincaid until he got out of college. That was not true. She believed it at that time but it was a mistake of fact. She also believed that Mr. Kincaid was not a college graduate. That also is false, as the record clearly shows. Finally, she believes that other persons, other applicants for the position, were not asked about night work or about their family's reaction to night work. The record is somewhat less than clear on that. We submit that is not shown, particularly in reference to the plaintiff's burden on that issue.

[147] Court: On that particular point, such memory as I have, is that Ms. Boone's testimony was that she said she made some facetious remark to the plaintiff about night work, but I don't remem-

ber any testimony—I think her testimony on that subject was that they had not, the others had not been asked about what their spouses thought. I may be wrong about that. Ms. Boone testified unconditionally at one point that they didn't ask that question of other people.

Mr. Van Hoy: We have contrary testimony. I think Mr. Nichols, for one, is the primary one that recollects the question.

Court: I'm talking about the testimony. You say there was no support for the testimony. She said twice that the other applicants were not asked about night work, and she said—although I don't believe I have a note here—she made some facetious remark to the plaintiff about night work.

Mr. Van Hoy: With due respect, Your Honor, I don't believe she characterized that as a facetious remark.

Court: Maybe she made some facetious remark to Kincaid. I don't know whether that word was used or not. Okay, go ahead.

Mr. Van Hoy: The plaintiff has the burden of proof. It remains with her all the time in this case, and she simply has not carried it. She has to do these three things, and she hasn't done any of them. (1) She's got to show she was [148] qualified for the position. Arguably, she is. Arguably, she is not. Clearly, the evidence shows Kincaid's qualifications to be superior. That's the second one. Has she shown she's better qualified? We submit that under no fair interpretation of the facts that are in evidence is that possible to reach that conclusion. Third, the opportunity to show pretext by the defendant. It is not shown as to anyone on the selection committee that they used suspicious criteria, legally suspicious criteria in making this selection.

I have compared the qualifications. Don't need to get into that again. If you look at this in reference to the burden of proof analysis in the Burdine and the Greene cases, judgment for the defendant is in order for the reasons I have set out in my argument the last few minutes, and we so pray the Court to direct judgment for us.

Court: All right, anything further for the plaintiff?

Mr. Wallas: Yes, Your Honor. I want to discuss the evidence perhaps in a little bit more detail than has yet been discussed. I think there are two ways of looking at this case from our position. (1) We take the position that Ms. Anderson was more qualified than Mr. Kincaid, based on an objective review of the qualifications that they presented to the committee. I think it's important that the Court distinguish between whatever the qualifications may have been and that which the committee knew about, that which the committee found out about through the [149] interview process or through the application process.

Our second position would be that the members of the committee, who were given no criteria by which to base their decision, in effect utilized whatever criteria and whatever biases each of them individually may have had, and we can show through the testimony of these people strong, unequivocal inferences of discrimination against woman and against Ms. Anderson because of her sex. A large portion of the evidence about which Ms. Anderson has testified has not even been rebutted by the defandants.

Let me start, first, simply with the comparison of the qualifications. Mr. Van Hoy says, as I understand his argument, that Mr. Kincaid was both more experienced than Ms. Anderson and more—had a

better educational background and was more qualified because of those two specific criteria. We know that the only criteria—and apparently it was somewhat informal—was the residency requirement that the person had to live there; and if you look at the testimony, for example, of Mr. McClellan, you can see really what happened. They decided Mr. Kincaid ought to get the job, and then they found some qualification Mr. Kincaid had which they were then going to say was the qualification they used. If you review the testimony, it shows they were not consistent. Mr. McClellan testified he chose Mr. Kincaid because of his education, but Mr. Kincaid was his second choice, and he really chose Mr. Broadway first [150] because of his experience. Mr. Broadway does not have a college degree. He had some courses at some schools, hardly enough to say he had an education there; moreover, there is no evidence that any of these courses or the quality of these courses was known to the committee, and that's also important with Mr. Kincaid. He testified that nobody asked him about the curriculum. Mr. Van Hoy ran through the curriculum, all these courses he'd had, and nobody on the committee ever asked him one question about those courses. The only person who seemed to speculate as to what those were was Mr. Butler, who said he had been through a similar program, so he speculated he'd had courses in this, that and the other things. Again, that is his own speculation. I ask the Court to just look at the resumés of the two people, the resumés of the two candidates we're talking about, Kincaid and Ms. Anderson; and if you look at any particular criteria, she has superior qualifications to Mr. Kincaid. There is much more in her testimony than simply her education and her work background. We

had testimony about her work in sports, her experience playing sports, supervising sports on the playground with her children, setting up the ballfields, putting out the bases, dealing with . . .

Court: Neither one of these applicants was a college athlete?

Mr. Wallas: I think Mr. Kincaid was involved in intramural sports. We would say Ms. Anderson was also involved in [151] sports and was knowledgeable in sports. She had children involved in sports. She was involved in the baseball teams her sons were involved in. Her employment history shows not only some experience in sports but it shows a year or two—it's not clear to me. It can't remember whether she was one or two years at Broughton where she was engaged in a recreational program dealing with various aged people, dealing with various types of programs, a range of programs. Mr. Kincaid had no similar experience other than the experience he had when he was with the Optimist Club in setting up sports leagues, not the breadth of experience Ms. Anderson had.

Second, she had a great deal of experience dealing with the public. She worked as a receptionist. She worked as a salesperson at Belk. She worked as Broughton, and then she taught school for a dozen or twelve years. I'm not sure of how many years. She dealt with the parents. She dealt with the students. She dealt with young people. She had to deal with money. Mr. Kincaid testified when I asked him did you learn a lot when you finally got out in the field, so to speak, and did some student teaching—yes, sir, I sure did. There are lots of ways to get experience, to get skills, and you don't have to go to school, I'll argue to the Court, to know how to budget for a league, a sports league,

Ms. Anderson said she budgeted for school trips. That's more budget experience, per [152] se, than Mr. Kincaid testified about. He may have had some courses in budgeting but, first of all, there is no evidence that the committee even knew that.

Education—now, Mr. Kincaid did have a degree in Physical Education, and that would qualify him to, I would assume, teach sports and to know something about many sports. Ms. Anderson also testified about her wide knowledge of sports, and she also had various experiences in education, teaching her children, and she went through all the courses she taught them, everything from reading to music and art, and so on, which would give her a wide experience to present programs to—in any recreational program.

Look at the civic activities that Ms. Anderson was involved in. Again, it shows that she's been active in the community. She testified about her Exchangette Club where she would go around and raise money and address various bodies, and so forth. I argue to you that she lists—her resumé is more professional. Not only is it more wide ranging and evidences more experience and better qualifications, but it's more professionally done. She has a whole lot of references here that the committee could have checked if they had been interested. There is no evidence that they talked to any of the references to see what kind of job she had done or what her work had been.

Now, that's our first argument. If you look at these things objectively, Ms. Anderson is more qualified.

[153] Our second argument is that the selection process was inflicted with sexual stereotypes, and some of the evidence, I think, is absolutely clear

about that, such that the decisions of the individual committeemen was—violates the law, and we have cases that we have set forth in our trial brief that talk about how a Court should look at these types of stereotypical questioning, for example, and draw conclusions therefrom; and Mr. Van Hoy gets up and says there is no direct evidence of sex discrimination. Well, he knows and this Court knows that there is not likely to be anyone to stand up and say, yes, we discriminated against Ms. Anderson because of her sex; and the cases are absolutely clear —Arlington Heights and the other cases that deal with intent and the fashioning or determination of intent that say that the Court looks at the evidence and makes reasonable inferences from the evidence and makes credibility decisions from the evidence and then must decide whether there is discrimination. The Coble case that we cited in our brief reversed a District Court for failing to rule in favor of a plaintiff when a number of stereotypical questions were answered.

Now, let me, if I might, briefly review why I say or why we say the plaintiff should prevail and why the evidence shows that there was discrimination. Ms. Anderson testified that Mr. Barnes told her that Donnie Kincaid had the job—Mr. Barnes being the Water Works official, or something like that, and this occurred sometime before the interviews, and there is [154] no evidence to the contrary. Mr. Barnes was listed on their witness list and he was not called. So, that is a fact that is established by this case and that makes it quite reasonable for Ms. Anderson to put on her letter of application and to read that letter or to state at the beginning of the interview—although she says she did not state it at the interview—that she felt like she was going

to be a victim of discrimination. Somebody told her that, and there is no evidence to the contrary.

Now, let's look at the motivation of these individuals and what their testimony—I'm talking about the committee members—was. Mr. Butler, for example, he was the first committee member after Ms. Boone to testify. He asked Mr. Broadway to apply, and he asked, I believe, two or—I believe two other males. He went out and sought those three males to apply for this job is his testimony, and then he testified, well, yeah, I know there are some women in the area who would be very qualified for this job —Ms. Haynes and Ms. Haynes. I believe there were two women by the name of Haynes. So, he said did you ask them to apply. He said, oh, no, of course not. We didn't ask them to apply because I knew they were making a higher salary than this job and they wouldn't do it. I assumed they wouldn't want the job.

Mr. Butler, with all due respect to him, had met Mr. Kincaid at the Optimist Club. I think he thought he would do a good job, and he decided he wanted Donnie Kincaid, if he [155] couldn't get Broadway, because Kincaid had evidenced the ability to deal with the male sports or predominantly male sports that Mr. Butler had been working with; and he didn't, we would submit, give Ms. Anderson proper consideration, and that is simply shown by the way he treated males in the interview, in suggesting they apply for the job. There is other testimony, I think, that would support that, but I think is the strongest testimony.

What about Mr. Nichols, who testified this morning? He clearly said that it would be real hard for a woman to do this job and that he wouldn't want his wife to do the job. I don't know how much more

stereotypical one could be in answering the questions. He made it clear that, at least in his mind, there were a number of strikes against any woman that would apply for the job. Now, of course, he denied that he discriminated against Ms. Anderson but, with all due respect, Judge, I think that is exactly the kind of testimony that these cases say shows the predisposition to choose a male.

Other evidence supports Ms. Anderson's position. For example, Mr. McClellan or Mr. Helms testified that Mr. Kincaid presented this flowing program that he was going to present and compared that to Ms. Anderson and said her program wasn't nearly as good; however, Mr. McClellan testified they both presented about the same program. So, their own witness contradicts Mr. Helms' testimony. Ms. Anedrson was there. She presented her program and all of her experiences, and apparently her presentation [156] was as good as Kincaid's, at least in the mind of one person.

Finally, we have the testimony of Ms. Boone, and I submit to the Court that Ms. Boone was forthright and honest in her answers. She specifically said, and the Court I believe—while Mr. Van Hoy was arguing—went back to his notes and saw that certain questions were asked Ms. Anderson that were not asked to the male applicants, questions about whether she would want to work at night, questions about what does your husband think, similar questions again which are stereotypical questions similar to the ones again, we would submit, in these cases that we have submitted.

Court: Is there any evidence in terms of formal qualifications as to whether the certificate that Mr. Kincaid has from the State is the same thing as the certificate that Ms. Anderson got after her work at Appalachian—that is . . .

Mr. Wallas: No, Your Honor, I don't think there is any evidence about . . .

Court: She said she had a certificate, the North Carolina State Recreation Director's Certificate.

Mr. Wallas: I believe he testified he got that after he joined some association and he got that after he got the job, and he didn't have it prior to the job. Ms. Anderson had hers, whatever her certificate was, prior to 1975.

Court: Is that the same thing?

Mr. Whitesides: Judge, I can tell you but it's not [157] in evidence. If you want to know, I've done a lot of research.

Court: Anybody got either one of them here?

Mr. Whitesides: No, sir, but the circumstances are, Judge, that the Society of Recreation and Park Directors, which is under the North Carolina Department of Recreation and headed by a lady named Beth Wilson, who is now Chairman of the Forestry Department, it was started way back then and between '54 and '57, if you got one of the certificates by filling out a form and sending it in, basically you got the thing if you'd done so many hours. They have changed it from a certificate basis to a society in which you belong as a member of a club. There is no 1958 equivalent to what there is now because it's kind of like the Right of Way Association, Judge.

Court: Either one of them, you get by belonging to a group. Is that right?

Mr. Whitesides: That's basically it, but the one they have now is an ongoing educational process, and the other one was just send in your ticket and you get a certificate. It was an upgrading tremendously in the past 15 years of how they work that.

Mr. Wallas: Judge, I have no way of knowing whether Mr. Whitesides is correct on that.

Mr. Whitesides: I checked on it yesterday while I was in Raleigh.

Mr. Wallas: Well, I suppose I object to his testimony [158] at this stage of the litigation.

Court: Well, as far as the record is concerned, it seems that both of these people had whatever ticket you can get by being a Recreational Director. She had one in '57. He got one in '75 after he was hired. All right, go ahead. That's aside.

Mr. Wallas: I think that is true. I think Ms. Anderson had whatever was available back then and Mr. Kincaid has what is available at this point.

Court: I didn't mean to throw you off the track. I thought you were about to the end of the track.

Mr. Wallas: I'm about to the end. Let me just make this final comment. One other thing that I've noticed in my notes is that Mr. Kincaid testified that he was not asked about night work but at some point volunteered that it would be like a life insurance salesman's job and you might have to work whenever you needed to work. So, at least he corroborates Ms. Boone's testimony that only Ms. Anderson was asked these questions. Admittedly, there is contrary testimony by various committee members —some of them saying one thing, some of them saying another. I noticed that nobody corroborated Mr. Helms' testimony that Ms. Anderson made a statement about being a victim of sex discrimination at the very beginning of her interview. It seems to me if she had made such a statement that other people would have remembered that. We contend that Ms. Anderson was [159] the most qualified person, that the process was very sloppily set up; and while that in itself is not a violation of the law, it enabled each of the interviewers to apply whatever, anything they wanted, to come into the process and apply any-

thing they wanted to, and we have shown some of them had clear biases against women—that the questions that were asked, that the experiences that they'd had, that the actions that they took all demonstrate bias against women and against Ms. Anderson and she's entitled to relief.

Now, I would say this about the relief stage of this case. As I understand the law, Ms. Anderson would be entitled to reinstatement, back pay, front pay and counsel fees, if we were to prevail. One of the things that strikes me in this case, and we discussed it, is that—as you remarked, Judge—this case is a long time from when all these events happened basically, I guess, because the EEOC took so long to make their determination, which is nobody's fault in this room, and Ms. Anderson at this point feels—and we have no reason to believe that Mr. Kincaid is not doing a good job. As far as I know, he's doing a fine job. We would not at this time request reinstatement. We would not request a bumping, that Mr. Kincaid lose his job at this point. We don't think under the circumstances—Ms. Anderson wants the job, but she understands that situation, and we would be satisfied, as far as relief is concerned, to receive appropriate back pay and interest and costs [160] and fees and would not ask that. So, we would ask, Judge, that you enter a finding in Ms. Anderson's favor for the reasons we have said with the relief as I have just described.

Mr. Whitesides: If I may take just a moment for two or three points of rebuttal. I notice in the plaintiff's list of witnesses the plaintiff lists as a witness Mr. Neil Barnes. This is the man about whom Mr. Wallas had so much to say about us not having called when he's on the plaintiff's list and

certainly available in the courtroom to be called had Mr. Wallas had anything Mr. Neil Barnes could say or needed to say because what was said was, and the Court so ruled, as I understand it, at the time that it was incompetent.

Speaking of Ms. Auddie Boone, Ms. Auddie Boone said in answer to two questions—and I think this is probably the only remark I made yesterday, but you were talking and she talked, and I stood up. Remember I said Ms. Boone had stated she had no evidence that the committee wanted a man, and then, further, at 4:12 o'clock yesterday afternoon, she said she did ask Donnie Kincaid how his new bride was going to feel about him being out at night, and that was the question that was asked to her. Clearly, it was the same question she is complaining about.

Now, Your Honor, I don't want to insult your intelligence I think you can see through this criteria that they're talking about. Everybody says that they wanted this fellow Broadway, [161] and Mr. Wallas has made a lot of comments about it because he had no education. I think, Judge, that's just like anything else. First of all, if a man is qualified from experience, they would take him; but when Broadway wouldn't move and they had to remove him, that removed anybody that had any experience qualifications—that is, in-depth experience qualifications.

Court: If you disregarded Anderson . . .

Mr. Whitesides: She had no in-depth experience qualifications in the field of recreation. She was a school teacher. Now, Judge, I consider a tremendous difference in the job qualifications for being a third grade school teacher and being the head of a Department of Recreation in a community. Now, she did work in 1958, some 18 years prior to that, for

basically one year at Broughton Hospital, but in that time she was just trying to make some sports go for a certain period, certain section of the hospital, and that would involve just trying to get the people themselves to doing it. She was—in effect, that was the physiotherapy that the people were getting. She would go to a ward and try to get them to play basketball or have a dance or something, but that was about the extent of it. When you go to the—anybody who had any experience—I think they said there were two good old boys from Bessemer City who had no education but just had experience in playing all the sports, so they wrote them off, too. So, I think the difference is that Mr. Broadway had in-depth practice of this. He was running [162] the Cramerton program and, having done that, that's why he was the choice of these people. When you remove him, you had nobody else that had in-depth experience. Then it became a question of who's got the best education and background that probably can get it, that probably can do it; and, Your Honor, I submit to you that teaching sports to one third class or the same third grade class over and over again year after year is remarkably different than running a program of this kind of education. What my experience in going to school was—the idea is to get the people and the game going and keep the kids from fighting and get them a little bit of exercise so when they go back in the room they won't be so restless, and that is basically what the program is in the elementary school.

Court: Now, what's the record on this one third grade class? She said she taught school in the third grade one term at Dallas, '73-74, had ten years of substitute teaching in all grades in the Gaston public schools.

Mr. Whitesides: The record says what did you do in the way of physical education. I was in charge of music, in charge of art and the other courses, and when we go outside I would be responsible for the physical education for my class. That's what the record says, and she said I'd have to see that the bases were lined up properly and that they had the ball and bat. That's basically what her responsibilites were with regard to that one third grade class. It had nothing to do with [163] the total school or total third grade. It's just the one grade that she was teaching. That's what she said.

Court: Okay.

Mr. Whitesides: She kept adding at the end for my class, for my class, when she would talk about her qualifications. I submit, Judge, that although, there is a certain amount of training for that, you're really not training people at the third grade level. Your idea is to let them get a little exercise to burn the energy off so they can come back inside and study and remain calm because third graders have a tendency to get a little excited after an hour or so in class.

Now, the other people, you know, basically everybody said has anybody said anything to you about a question of not having a woman or having any bias for anything or anybody, and basically they all agreed no. Judge, there is one criteria I would like for you to notice. Who was the Chairman of this committee? Auddie Boone. Who had the right to determine when they had the meeting? Surely, that would be the Chairman. As the Chairman, what delegation of responsibility did she take upon herself to see that we all acted in unanimity and that we all worked on the same basis, that we all had the same documents before us or to see that everybody

on the committee had a copy of everybody's resumé? She didn't do any of this. She had the opportunity to . . .

Mr. Wallas: Objection. There is no evidence one way [164] or another on that. He's testifying again about something that was not testified about, what Ms. Boone didn't do. Everybody said they had—it was asked did they look at the applications and had an opportunity to review them.

Court: All right, I guess you better get back on the record.

Mr. Whitesides: The record says, Judge, that she was a member of the City Council. The record says she was the only female member of the City Council. The record says the Mayor appointed the only member of the City Council, a female, to be the Chairman of this recreation committee. Now, if that indicates discrimination, it does because it took 100 percent of the women and put them in 100 percent of the authority, and he put her in a position of authority, and if she wanted to exercise some control over it, she had every right and power to do it. Now, Judge, I was trying to draw an analogy between the practice that Ms. Anderson had and the things she was doing and some of the practice that Mr. Kincaid had and the things that he was doing. You know, it's like what someone has told me one time. I understand the theory of the flight to the moon but the astronauts have been there. I think that's the whole key. I don't know whether you agree with this or not, but if I were going to try a case in front of you tomorrow I would not go get a title lawyer, regardless of how good a title lawyer he may be. I think I would get somebody who had once or twice before, nor [165] would I get a courtroom

watcher because, although he may know what you mean when you say object and so forth, the courtroom watcher has just not carried the pail, and that's it. Who had carried the pail? What has ridden the horse? That's the man that—the person that you need for the job is the person who has ridden the horse, not just the person who has seen the horse. It's like my father said when he went into the Army. They said you're from the woods, North Carolina, let's put you in the Calvary. You know what a horse is? He said, yes, it's got a tail on one end and a head at the other, and somewhere in-between is where you try to stay, and so they put him in something else. That's the whole point of this transaction. I recognize good music, but you've never heard me sing. I hope you will never hear me sing, but the whole point of it is, Judge, he's carried the pail. He's ridden the horse, and he knew what the transaction was about; and, truthfully, this lady had been exposed to a lot of this third grade teaching and so forth, and . . .

Court: She's made no claim about third grade teaching except she said she taught one third grade for one year.

Mr. Whitesides: As I understand it . . .

Court: Have you read her resumé?

Mr. Whitesides: Yes, sir, but her testimony was the fact that she had been a teacher and . . .

Court: She said she taught ten other years substituting in all grades in the public schools.

[166] Mr. Whitesides: Yes, sir, but the substitution, Judge, that substitute teaching is a great thing, but I think it's a day-to-day type basis. It lends itself to no basic programming. I will then defer to His Honor's wishes.

Court: I'm not trying to cut you off. If you want to talk about one activity, you can talk about her recreational experience at Morganton, which was two years. That's two times nine, plu six. That's nearly three times as much time spent at Morganton at work as she had in the third grade in Dallas.

Mr. Whitesides: Judge, perhaps I'm more familiar with Broughton Hospital than most of the people in here, and I don't know whether that is a good or bad thing.

Court: We have to go by the testimony that was presented. You could have testified earlier but don't testify any more in the argument.

Mr. Whitesides: The point I'm saying is the problems that are confronting the Bessemer City community of North Carolina with cradle-to-grave people, with a community of all types of persons and all types of needs is so variedly different from the confined members of the Broughton Hospital group that their experience I don't think really makes it too big a switch. I mean it's such a big switch that it doesn't make it, and it was 18 years ago, and I think that makes a lot of difference.

Court: You're really saying that the time spent doing all these other things is totally irrelevant to recreation [167] activities?

Mr. Whitesides: Judge, as far as hiring somebody for it, yes. As far as being able to do it or wanting to do it or having a desire, yes, but I wouldn't hire somebody who had all those criteria, if it was my choice, simply on the basis of these things unless I knew more in the way of experience.

Mr. Wallas: Could I make one final comment, since I assume we are allowed to go last?

Court: All right.

Mr. Wallas: I want to respond to two things that Mr. Whitesides said. One, they have created or are attempting to create an impression that this job of Recreation Director is simething that only almost an MBA graduate can handle. What the evidence is is that—I believe he had one secretary who was employed in the Recreation Department when he was, as of 1975, and that's the only person that would have been supervised by the Recreation Director. I believe somebody may have said there as a maintenance man. There may have been two. Ms. Anderson had supervised a number of employees at Broughton, so she had experience supervising people. Mr. Kincaid had never supervised anybody, and to say that he had been there, as Mr. Whitesides said about the moon, the only place he had been was to school, to a little bit of student teaching and Commercial Credit. He hadn't been anywhere as far as experience in the work world was concerned and certainly not as a Recreational [168] Director.

Court: All right, I'll think about it and let you know.

CERTIFICATE

I, Evelyn S. Berger, Official Court Reporter for the United States Court for the Western District of North Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of the proceedings in the above entitled matter, as taken by me in Stenotypy and by recording machine.

This 9th day of October, 1982.

/s/ EVELYN S. BERGER
Official Court Reporter

AMICUS CURIAE

BRIEF

Office - Supreme Court, U.S.
FILED
AUG 15 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1623

In the Supreme Court of the United States

OCTOBER TERM, 1984

PHYLLIS A. ANDERSON, PETITIONER

v.

CITY OF BESSEMER CITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

REX E. LEE
Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

CAROLYN F. CORWIN
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOHNNY J. BUTLER
General Counsel (Acting)

PHILIP B. SKLOVER
Associate General Counsel

VINCENT BLACKWOOD
Assistant General Counsel

IRENE HILL
Attorney

Equal Employment Opportunity Commission
Washington, D.C. 20507

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the court of appeals misapplied the standard of review prescribed by Fed. R. Civ. P. 52(a) in reversing the district court's findings of fact in this case.

2. Whether the court of appeals erred in concluding that the fact that male selection committee members were married to women who had been employed dispelled inferences from other evidence in the record that those members were biased in favor of hiring a male for the position of Recreation Director.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	7
Argument:	
I. The court of appeals misapplied the standard of review prescribed by Fed. R. Civ. P. 52(a) in reversing the district court's findings of fact in this case	9
II. The court of appeals erred in concluding that the fact that male selection committee members were married to women who had been employed dispelled inferences from other evidence in the record that those members were biased in favor of hiring a male for the position of Recreation Director	17
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36	1
Boyd v. *Boyd*, 252 N.Y. 422, 169 N.E. 632	16
Castaneda v. *Partida*, 430 U.S. 482	9, 19
Coble v. *Hot Springs School District No. 6*, 682 F.2d 721	16
Davis v. *Murphy*, 587 F.2d 362	15
Graver Mfg. Co. v. *Linde Co.*, 336 U.S. 271	15
Inwood Laboratories, Inc. v. *Ives Laboratories, Inc.*, 456 U.S. 844	9
Pullman-Standard v. *Swint*, 456 U.S. 273	7, 10, 11
United States v. *Crescent Amusement Co.*, 323 U.S. 173	16-17
United States v. *El Paso Natural Gas Co.*, 376 U.S. 651	16

Cases—Continued: Page

United States v. *National Association of Real Estate Boards*, 339 U.S. 485 10
United States v. *Oregon State Medical Society*, 343 U.S. 326 16
United States v. *United States Gypsum Co.*, 333 U.S. 364 9
Weiner v. *County of Oakland*, 14 Fair Empl. Prac. Cas. (BNA) 380 16
Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 395 U.S. 100 9

Statute and rule:

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. (& Supp. V) 2000e *et seq.* 1, 3
42 U.S.C. 2000e-5 1
42 U.S.C. (& Supp. V) 2000e-16 2
Fed. R. Civ. P. 52(a) ..... *passim*

Miscellaneous:

9 C. Wright & A. Miller, *Federal Practice and Procedure* (1971) 10, 15

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1623

PHYLLIS A. ANDERSON, PETITIONER

v.

CITY OF BESSEMER CITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.*, prohibits, inter alia, discrimination on the basis of sex in employment. The Equal Employment Opportunity Commission and the Attorney General are responsible for the enforcement of federal employment discrimination statutes, including Title VII. Title VII is also enforced through private lawsuits, 42 U.S.C. 2000e-5, which provide an important complement to federal enforcement efforts. See, *e.g.*, *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974). The federal government therefore has

an interest in the development and even-handed application of proper standards to govern Title VII actions. In addition, since the government as an employer is subject to private suit under Title VII, 42 U.S.C. (& Supp. V) 2000e-16, the decision in this case may affect the federal government as a Title VII defendant.

STATEMENT

1. In early 1975, respondent, the City of Bessemer City, North Carolina, began the process of filling the position of Recreation Director for the City. The mayor appointed a selection committee consisting of four men and one woman. Leona "Auddie" Boone, the female member of the committee, was appointed chairperson by virtue of her position as a member of the City Council. Although the City did not establish any formal educational or experience requirements for the position, the members of the selection committee testified that they were seeking the person who had the best background to perform the duties of the position. The committee members also agreed informally that the Recreation Director should reside in the City. The position was advertised in the local newspaper and by word-of-mouth. Pet. App. 9a, 36a-37a; J.A. 68a-69a, 78a, 106a-108a, 109a, 116a-117a, 140a-141a, 144a-145a, 149a, 153a, 157a-160a, 164a, 165a-167a.

Eight persons, including petitioner, applied for the position of Recreation Director. Petitioner was the only female applicant. After interviewing all the candidates, the selection committee concluded that three applicants—Burt Broadway, Donald Kincaid, and petitioner—were qualified for the position. All of the committee members agreed that Broadway, who was then Recreation Director of Cramerton,

North Carolina, was the most qualified. However, Broadway indicated during his interview that he would not relocate to Bessemer City. The committee then voted 4-1 to offer the position to Kincaid. The four male committee members voted for Kincaid, while Boone, the female member, voted in favor of petitioner. Pet. App. 9a-11a, 13a-14a, 38a-39a; J.A. 107a-108a, 119a-120a, 132a-133a, 139a-141a, 144a, 147a, 153a, 157a, 163a-164a.

Boone subsequently informed petitioner that she believed petitioner was more qualified for the position of Recreation Director than Kincaid and that Kincaid was hired because he was a man. Boone told petitioner that the selection committee did not consider all the qualifications of the candidates and that only petitioner had been asked by the committee about her ability to work at night. Pet. App. 14a-15a; J.A. 82a, 96a, 121a.

2. Petitioner filed a charge of discrimination with the Equal Employment Opportunity Commission. The Commission determined that there was reasonable cause to believe that respondent had failed to hire petitioner because of her sex and issued a notice of right to sue to petitioner. Pet. App. 15a; J.A. 63a, 64a-67a, 82a-83a. Petitioner then brought this suit in the United States District Court for the Western District of North Carolina, alleging that respondent had discriminated against her on the basis of sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.* Following a bench trial, the district court concluded that respondent had violated Title VII by intentionally discriminating against petitioner because of her sex when it failed to hire her for the position of Recreation Director (Pet. App. 1a-32a). The district court en-

joined respondent from discriminating on the basis of sex in employment and awarded petitioner $30,397 in back pay plus interest (*id.* at 33a-34a).

The district court based its finding of intentional discrimination on three subsidiary findings of fact. First, the court found that only petitioner was seriously questioned by committee members about whether she knew the position of Recreation Director involved working at night and travel to meet with other recreation directors and about her husband's reaction to her application for the job (Pet. App. 12a-13a). Second, the court found that petitioner was better qualified than Kincaid to perform the broad range of duties required of a Recreation Director and that the subjective decisionmaking process allowed committee members to make a selection for their own reasons (*id.* at 15a-19a).

Finally, the district court found that the male selection committee members were biased toward selecting a male for the position of Recreation Director, particularly someone versed in the traditionally male-dominated sports. The court inferred bias from evidence that (1) only petitioner was seriously questioned about after-hours work and her spouse's reaction to the job; (2) one male committee member solicited applications from qualified men but not from two women whom he considered qualified;[1] (3) another male committee member testified that it would be "real hard" for "a lady" to be the Recreation Director and that he thought his wife should be at home at night (J.A. 158a, 161a); (4) the male

[1] That committee member testified that he believed the two women would not have been interested in the position of Recreation Director because it paid less than what he assumed they already were earning in their teaching positions. See J.A. 148a-149a.

committee members testified that Kincaid was more qualified than petitioner because he had a college degree in health and physical education, although Broadway (the committee's first choice for the job) had no college degree; (5) two of the male committee members emphasized the importance of organizing traditionally male-dominated sports leagues and did not mention the other activities for which the Recreation Director would be responsible; and (6) there was no substantial difference in the overall recreational programs presented by petitioner and Kincaid during their interviews. Pet. App. 21a-23a.

3. The court of appeals reversed (Pet. App. 35a-65a). It held that certain of the district court's subsidiary findings of fact, as well as its ultimate finding of intentional discrimination, were clearly erroneous. The court of appeals weighed the education and experience of petitioner and Kincaid and concluded that, while petitioner was qualified for the position of Recreation Director, "Kincaid's overall training was superior to [petitioner's] training and experience for the demand[s] of this job" (*id.* at 54a (footnote omitted)). The court of appeals also held that there was no evidence to support the district court's findings that only petitioner was questioned about after-hours work, travel, and her husband's reaction to the job. Although it acknowledged that there was conflicting testimony on this point, the court of appeals found that Kincaid had been questioned in a similar manner. Pet. App. 56a-59a.

Following its conclusion that the district court's findings of fact were clearly erroneous with respect to petitioner's and Kincaid's qualifications and the questions posed to the two applicants, the court of appeals held that the remaining evidence relied on by the district court was insufficient to support its find-

ing that the male committee members were biased toward selecting a male as Recreation Director. Pet. App. 60a-62a. The court of appeals noted that the district court had inferred bias from the facts that one of the male committee members had failed to solicit applications for the position from two admittedly qualified females and that another male committee member testified that he believed it would be "real hard" for a woman to serve as Recreation Director. The court of appeals concluded that any inferences of bias from this evidence were dispelled by the fact that all of the male committee members were married to women who had worked and were accustomed to being away from home during evening hours. *Id.* at 61a n.5. The court of appeals also rejected the district court's emphasis on the fact that the hiring decision had been made on the basis of subjective, unarticulated criteria, since "[t]he use of subjective criteria to hire employees is not * * * illegal *per se*" (*id.* at 61a).

The court of appeals concluded by asserting that its close scrutiny of the record in this case was justified by the manner in which the district court prepared its findings of fact and conclusions of law. The court of appeals expressed its disapproval of the district court's practice of itself preparing a memorandum decision and then requesting that the prevailing party submit more detailed proposed findings and conclusions, followed by an opportunity for response by the opposing party. The court of appeals referred to earlier decisions, in which it had stated that a district court should request proposed findings of fact and conclusions of law from both parties before it reaches a judgment and should accept whatever it deems appropriate from each submission. Pet. App. 63a-65a.

SUMMARY OF ARGUMENT

I.A. Fed. R. Civ. P. 52(a) provides that "[f]indings of fact shall not be set aside [on appeal] unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Under the "clearly erroneous" standard an appellate court should not weigh the evidence de novo and supplant the district court's determinations with its own. The "clearly erroneous" standard applies to appellate review of the district court's finding of discriminatory intent in this case. See *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982).

In our view, the court of appeals misapplied the Rule 52(a) standard of review in this case. In reversing the district court's finding of discriminatory intent, the court of appeals appears to have engaged in a de novo review of the evidence. In the course of doing so, the court of appeals disregarded significant evidence that supports the district court's findings and second-guessed the credibility determinations of the district court in connection with conflicting testimony.

B. The court of appeals misapplied the "clearly erroneous" standard of Rule 52(a) in reversing the district court's finding that petitioner was better qualified to perform the duties of Recreation Director than Donald Kincaid, who was hired for the position. The court of appeals disregarded record evidence of petitioner's relevant work experience and skills; in addition, it made no reference to Kincaid's lack of experience in certain areas. It was the district court's responsibility to weigh all the evidence; and its finding that petitioner was more qualified than Kincaid was amply supported by the record. The court of

appeals erred in conducting a de novo review of the evidence on this question.

C. The court of appeals also misapplied Rule 52(a) when it reversed the district court's finding that petitioner was the only applicant who was seriously questioned by the selection committee about after-hours work, travel, and her spouse's reaction to her application for the position of Recreation Director. There was conflicting testimony about what questions had been asked of the various applicants. The district court, after considering the credibility of the witnesses, resolved the conflicts in favor of petitioner. The district court, unlike the court of appeals, heard the testimony of the witnesses about the questioning of applicants and was able to evaluate it in light of factors such as demeanor and tone of voice. The court of appeals' failure to give due regard to the district court's credibility determinations on this subject is clearly contrary to the command of Rule 52(a).

II. The court of appeals erred in concluding that inferences of bias from record evidence were dispelled by the fact that the male selection committee members were married to women who had been employed and were accustomed to being away from home in the evenings. There was significant evidence that the male committee members were biased in favor of selecting a male as Recreation Director. For example, one male committee member acknowledged that he had solicited applications from qualified men, but not from qualified women, while another testified that he believed it would be "real hard" for a "lady" to serve as Recreation Director and that he would not want his wife to hold the job. The inference of bias the district court drew from this and other evi-

dence in the record is not rebutted by the mere fact that the wives of the male committee members had been employed. As this Court recognized in *Castaneda* v. *Partida*, 430 U.S. 482, 499-500 (1977), an individual's personal circumstances will not necessarily prevent him from harboring discriminatory intent in other contexts. The court of appeals therefore erred in relying on the personal circumstances of the male committee members as the basis for rejecting the district court's finding that those members were biased in favor of selecting a male as Recreation Director.

ARGUMENT

I. THE COURT OF APPEALS MISAPPLIED THE STANDARD OF REVIEW PRESCRIBED BY FED. R. CIV. P. 52(a) IN REVERSING THE DISTRICT COURT'S FINDINGS OF FACT IN THIS CASE

A. Fed. R. Civ. P. 52(a) provides that "[f]indings of fact shall not be set aside [on appeal] unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." A finding of fact is "clearly erroneous" when the reviewing court, on the basis of all the evidence, is left with the definite and firm conviction that an error has been made. *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844, 855 (1982); *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948). It is well settled, however, that an appellate court should not consider and weigh evidence de novo and supplant the district court's judgment with its own. *Inwood Laboratories, Inc.*, 456 U.S. at 856; *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). "The mere fact that on the same evidence

the appellate court might have reached a different result does not justify it in setting the findings aside. It may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or induced by an erroneous view of the law." 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2585, at 732-734 (1971) (footnotes omitted). See also *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485, 495-496 (1950).

This case turns on the question whether respondent, through its selection committee, acted with discriminatory intent when it hired a male applicant, rather than petitioner, for the position of Recreation Director. In *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982), this Court held that the existence of discriminatory intent is an issue of fact to be determined by the trial court. "Thus, a court of appeals may only reverse a district court's finding on discriminatory intent if it concludes that the finding is clearly erroneous under Rule 52(a)." 456 U.S. at 290.

Here the district court found as a matter of fact that respondent had acted with discriminatory intent when it failed to hire petitioner. The court of appeals correctly recognized (Pet. App. 55a-56a, 59a) that it should apply the "clearly erroneous" standard of Rule 52(a) in reviewing the district court's findings of fact. But in our view the court of appeals misapplied the Rule 52(a) standard by engaging in a de novo review of the record and making an independent determination of whether respondent acted with discriminatory intent.[2] In the course of its re-

[2] An appellate court's recitation of the correct standard of review is not decisive of the question whether the court actually followed that standard. Instead, it is necessary to examine the opinion and the entire record in order to determine whether the appellate court improperly engaged in an independent review of the record. See *Pullman-Standard* v. *Swint*, 456 U.S. at 290-291.

view, the court of appeals disregarded much of the record evidence that supports the district court's findings; moreover, the court of appeals gave insufficient deference to the credibility determinations made by the district court, in contravention of the express command of Rule 52(a).

B. The district court found expressly that petitioner was better qualified to perform the "broad range of duties required of a Recreation Director" (Pet. App. 26a) than Donald Kincaid, the applicant who was hired. In making that finding, the district court considered the backgrounds of petitioner and Kincaid and the testimony of the committee members that they were looking for the person with the best background to perform the duties of the position, which included development of a well rounded recreational program for all ages and both sexes (see J.A. 108a, 160a, 164a; and see *id.* at 56a, 70a-71a).

There is substantial evidence in the record to support the district court's finding that petitioner was better qualified for the position of Recreation Director than Kincaid. Petitioner was a college graduate with a B.S. degree in elementary education. She had also earned an associate degree and had taken additional courses in guidance, logic, government, history, and decoupage, as well as a course in public speaking. Petitioner had more than 20 years of work experience. She had been a substitute teacher in the public schools for ten years and had taught a third grade class during 1973-1974. Petitioner had taken courses in supervising physical education activities,

had taught her own physical education classes, had herself played softball, basketball, and soccer, and had a basic knowledge of all sports. In addition, she had taught art and music to her students. During 1956 and 1957 petitioner had worked in the recreation department of Broughton Hospital, where she directed ball games, dances, and crafts for patients and supervised some employees in connection with these activities. She had also worked as a receptionist/bookkeeper and as a sales clerk in a department store. Petitioner had gained experience in public speaking in the course of her work in civic activities, and she had some experience with budgeting, planning activities, and recruiting people to work on projects. Pet. App. 16a-18a; J.A. 58a-60a, 86a-91a, 92a-93a, 98a-99a, 100a, 103a-104a.

Kincaid had earned his B.S. degree in health and physical education approximately ten months before he applied for the position of Recreation Director. During college he had completed student teaching. After graduation, Kincaid had worked in the finance department of a credit bureau and had sold insurance for two months. He had played various sports during high school and college and had helped organize little league basketball games in Bessemer City. Pet. App. 18a-19a; J.A. 62a.

The court of appeals concluded, contrary to the district court's finding, that Kincaid was better qualified for the position of Recreation Director (Pet. App. 49a-54a). Although the City had not formally articulated requirements for the position, the court of appeals found, on the basis of the selection committee's initial decision that Burt Broadway was the best qualified applicant, that the committee members

were particularly concerned about athletics.[3] The court of appeals concluded that Kincaid was better qualified for the position because he had more formal training and life experiences in athletics than petitioner. The court made no reference to petitioner's experience, and Kincaid's lack of experience, in other areas, such as arts and crafts, music, and dance. The court of appeals correctly noted (*id.* at 53a-54a) that petitioner's experience in supervision, budgeting, and recreation was limited in various respects, but it made no reference to the fact that Kincaid had no experience at all in these areas. The court of appeals also disregarded the testimony of committee chairperson Boone that petitioner was the best all-around candidate for the job.[4]

It is clear from this summary that the court of appeals engaged in a de novo review of the evidence relating to the relative qualifications of the candi-

---

[3] We note, however, that while all four male committee members testified that Broadway was their first choice for Recreation Director, none referred to his experience with athletics as the reason for preferring him. See J.A. 140a-141a, 144a, 147a-148a, 153a, 154a-155a, 157a, 159a, 163a-164a, 165a, 170a. In his resume Broadway noted specifically that he was "capable of organizing programs tailored to Bessemer City not only in athletics but other programs, also" (*id.* at 73a).

[4] As petitioner notes (Pet. 19-21), the court of appeals quoted only a part of the transcript of Boone's testimony when it suggested (Pet. App. 54a-55a n.4) that Boone acknowledged that petitioner was not more qualified than Kincaid in particular respects. A reading of the entire line of questioning (J.A. 109a, 117a) suggests not that Boone believed Kincaid was as qualified as, or more qualified than, petitioner in each specific area mentioned, but that Boone was resisting the attempt of the cross-examiner to get her to modify her expressed judgment that petitioner was the best all-around candidate.

dates. In doing so, the court of appeals ignored considerable evidence that supports the district court's finding that petitioner was more qualified for the position of Recreation Director than Kincaid. In addition, the court of appeals appears to have substituted its judgment for that of the district court, particularly in evaluating the evidence of what qualifications a Recreation Director was expected to possess. The court of appeals was correct in concluding that some parts of the record support respondent's claim that it chose Kincaid because of his qualifications for the position. However, there was also substantial evidence to support petitioner's version of the facts. It was the district court's responsibility to weigh all the evidence and to reach a finding concerning the relative qualifications of the applicants. The court of appeals' de novo review of the evidence exceeds the narrow scope of the "clearly erroneous" standard prescribed by Rule 52(a).

C. The district court found that only petitioner was questioned seriously by the selection committee about after-hours work, travel, and her spouse's reaction to her application for the job (Pet. App. 12a-13a). The testimony in the record includes varying accounts of the questions that were addressed to petitioner and the other applicants. There is some evidence (see J.A. 121a, 146a) that during Kincaid's interview Boone had remarked "and your new bride won't mind." The district court stated expressly (*id.* at 12a-13a) that it had "carefully considered the conflicting testimony * * * and * * * the credibility of the different witnesses" in concluding that only petitioner was asked serious questions about night work or her spouse's reaction to her application for the job and that Boone's remark to Kincaid was meant to be

facetious and the result of her annoyance that only petitioner was asked such questions. Although it acknowledged that there was conflicting testimony on the subject, the court of appeals nevertheless concluded that there was no record support for the district court's characterization of Boone's remark and that petitioner and Kincaid in fact had been asked substantially similar questions (*id.* at 56a-59a).

Rule 52(a) requires that an appellate court give due regard to the credibility determinations of the trial court. An appellate court "must be especially reluctant to set aside a finding based on the trial judge's evaluation of conflicting oral testimony, and will do so only under most unusual circumstances." 9 C. Wright & A. Miller, *supra*, § 2586, at 737 (footnotes omitted). See also, *e.g.*, *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949); *Davis* v. *Murphy*, 587 F.2d 362, 364 (7th Cir. 1978). Here there are no unusual circumstances that would warrant setting aside the district court's finding of fact.

It is true that two of the male committee members testified in a manner that supported respondent's claim that petitioner was not singled out for special questioning. See J.A. 145a-146a, 151a, 157a-158a. However, that testimony was neither specific nor entirely consistent. Kincaid himself testified that he commented about night work during his interview, but he declined to agree that he had been questioned on that subject by any committee member. See J.A. 129a. Boone testified that the questions about night work and reactions of spouses were not asked of anyone but petitioner and characterized her own statement to Kincaid as a comment rather than a question (J.A. 108a, 120a-121a). The district court, un-

like the court of appeals, was present during Boone's testimony about her statement during Kincaid's interview and may have interpreted her tone of voice or mannerisms as indicating that she had not asked him a serious question.[5] Cf. *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 339 (1952) (quoting *Boyd* v. *Boyd*, 252 N.Y. 422, 429, 169 N.E. 632, 634 (1930)). It was the district court's responsibility to resolve the conflicting testimony concerning the questions addressed to petitioner and Kincaid. Under Rule 52(a), the court of appeals should not have second-guessed that resolution.[6]

---

[5] The district court referred specifically to the fact that it had heard live testimony concerning the questions asked of the applicants. See Pet. App. 13a.

The court of appeals stated that since night work and travel were part of the duties of the Recreation Director, "any question on these subjects to any of the candidates were [*sic*] certainly job-related" (Pet. App. 59a). But an inference of discrimination may be created when job-related questions are not addressed to all candidates, especially when the questions reflect an assumption that family responsibilities might interfere with a female applicant's ability to perform a job. See, *e.g.*, *Coble* v. *Hot Springs School District No. 6*, 682 F.2d 721, 724, 726-727 (8th Cir. 1982); *Weiner* v. *County of Oakland*, 14 Fair Empl. Prac. Cas. (BNA) 380 (E.D. Mich. 1976).

[6] The court of appeals stated (Pet. App. 63a-65a) that its close scrutiny of the record in this case was justified by the manner in which the district court prepared its opinion. See page 6, *supra*. We do not believe such actions by a district court would warrant a court of appeals' undertaking to make de novo factual determinations in disregard of the deference a court of appeals should give to findings of fact and credibility determinations under Rule 52(a). Cf. *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656 (1964); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 184-185 (1944). In any event, in the circumstances of this case it is evident that the findings and conclusions of the district court were the product of its own independent judgment.

The district court initially issued a memorandum of decision that described in some detail the evidence on which it had relied. See Pet. App. 1a-5a. That memorandum included the findings that petitioner was better qualified than Kincaid and that only petitioner was asked questions "which implied substantial doubt that a woman ought to have a job which required night work and which suggested that a woman ought to be at home instead of working" (Pet. App. 4a). Thus, the district court both decided the ultimate issues in the case and made the critical findings of subsidiary facts before it requested submission of proposed findings of fact and conclusions of law.

Following unsuccessful efforts at settlement, petitioner's counsel filed proposed findings of fact and conclusions of law, and respondent's submitted a detailed response. See J.A. 11a-33a, 36a-47a. The findings and conclusions ultimately issued by the district court differ in a number of respects from petitioner's proposals, apparently as a result of the district court's own rewording and its incorporation of comments submitted by respondent. *E.g.*, compare J.A. 13a with Pet. App. 11a; compare J.A. 13a-14a with Pet. App. 12a-13a; compare J.A. 17a-19a with Pet. App. 16a-19a; compare J.A. 22a-24a with Pet. App. 21a-23a. And contrast J.A. 17a (¶ 16(a)) with J.A. 40a and Pet. App. 16a, 18a; contrast J.A. 17a (¶ 16(b)) with J.A. 45a and Pet. App. 17a, 18a-19a.

II. THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE FACT THAT MALE SELECTION COMMITTEE MEMBERS WERE MARRIED TO WOMEN WHO HAD BEEN EMPLOYED DISPELLED INFERENCES FROM OTHER EVIDENCE IN THE RECORD THAT THOSE MEMBERS WERE BIASED IN FAVOR OF HIRING A MALE FOR THE POSITION OF RECREATION DIRECTOR

After finding clearly erroneous the district court's findings that petitioner was better qualified than Kincaid for the position of Recreation Director and

that only petitioner was seriously questioned about night work, travel, and her spouse's reaction to the job, the court of appeals held (Pet. App. 60a-62a) that the remaining evidence relied on by the district court was insufficient to support its finding that the male selection committee members were biased in favor of selecting a male for the job. The court of appeals noted that there was evidence that one male committee member solicited applications from qualified males but not from qualified females and that another male committee member had testified that he preferred Kincaid over petitioner for the job in part because it would be "real hard" for a woman to serve as Recreation Director (see J.A. 158a, 161a).[7] The court of appeals concluded, however, that this direct evidence of discrimination was "inadequate to support a finding of bias, and is dispelled by other portions of the record" (Pet. App. 61a n.5).[8] The court stated (*ibid.*):

> For example, there is nothing to show the male committee members had a bias against working women. All four testified that their wives had worked and were accustomed to being away from home during evening hours. The wife of one committee member had worked a night shift for ten years and the wife of another had performed night work[] as a Registered Nurse.

[7] The court of appeals failed to mention certain other evidence relied on by the district court in support of its finding that the male committee members were biased in favor of choosing a male for the job. See pages 4-5, *supra*.

[8] This Court need not decide whether this evidence, standing alone, would have been adequate to support the district court's ultimate finding of discrimination, since, as we have shown in point I, *supra*, the court of appeals erred in setting aside additional factual findings on which the district court's ultimate finding was premised. See also note 7, *supra*.

The court of appeals disregarded certain record evidence in its description of the personal circumstances of the male committee members.[9] But, at all events, the court of appeals relied on a presumption that is flawed—*i.e.*, the presumption that a man married to a woman who is employed will not discriminate against women seeking employment. This Court held in *Castaneda* v. *Partida*, 430 U.S. 482, 499-500 (1977), that evidence that the majority of county jury commissioners were Mexican Americans was insufficient to rebut a prima facie case of discrimination against Mexican Americans in the grand jury selection process. The Court noted that "[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." *Id.* at 499. Likewise, in this case it cannot be assumed that the personal circumstances of the male committee members would prevent them from harboring any discriminatory intent in other contexts. The court of appeals therefore erred in concluding that the district court was required to find that the clear and direct

[9] For example, the court of appeals did not mention the testimony of one of the male committee members, expressly relied on by the district court (Pet. App. 21a), that he believed that his "wife should be at home at night" (J.A. 161a). The same committee member acknowledged that he would not have wanted his wife to have the position of Recreation Director (*ibid.*). The court of appeals also failed to note that only one committee member's wife was working at the time of trial, while two of the other committee members' wives had not worked for a number of years (*id.* at 146a-147a, 153a-154a, 159a, 167a).

evidence of discriminatory intent on the part of the male committee members was rebutted by the fact that their wives had been employed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

CAROLYN F. CORWIN
Assistant to the Solicitor General

JOHNNY J. BUTLER
General Counsel (Acting)

PHILIP B. SKLOVER
Associate General Counsel

VINCENT BLACKWOOD
Assistant General Counsel

IRENE HILL
Attorney

Equal Employment Opportunity Commission

AUGUST 1984

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 421023 10029

AMICUS CURIAE

BRIEF

Office-Supreme Court, U.S.
FILED
AUG 15 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1623

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PHYLLIS A. ANDERSON,

Petitioner,

—v.—

CITY OF BESSEMER CITY, etc.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, NOW LEGAL DEFENSE AND EDUCATION FUND, AND WOMEN'S LEGAL DEFENSE FUND, *AMICI CURIAE* IN SUPPORT OF PETITIONER

JOAN E. BERTIN
Counsel of Record
E. RICHARD LARSON
BURT NEUBORNE
ISABELLE KATZ PINZLER
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Attorneys for Amici Curiae

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

INTEREST OF AMICI.....1

STATEMENT OF THE CASE.....4

SUMMARY OF ARGUMENT.....11

ARGUMENT.....14

Introduction.....14

I. *Burdine* Does Not Govern A Case, Such As The Present One, In Which There Is Direct Evidence Of Intentional Discrimination.....16

II. Unrefuted Direct Evidence of Discriminatory Motive Establishes Title VII Liability Which Cannot Be Avoided by Mere Articulation of A Purportedly Legitimate Reason for Challenged Conduct.....31

III. Marriage to A Working Woman Does Not Rebut Direct Evidence of A Man's Discriminatory Motivation...45

CONCLUSION.....51

TABLE OF AUTHORITIES

Cases:

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).....26

Alexander v. Louisiana, 405 U.S.625 (1972).....39

Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977).....31-32,41

Bell v. Birmingham Linen Service, 715 F.2d 1552 (11th Cir. 1983), cert. denied, ___ U.S. ___, 52 U.S.L.W. 3844 (U.S. May 22, 1984) 28,33-34

Boykin v. Georgia Pacific Corp., 706 F.2d 1384 (5th Cir. 1983), cert. denied, ___ U.S. ___, 104 S.Ct. 999 (1984).....27

Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).....32

Burrus v. United Tel. Co. of Kansas, 683 F.2d 339 (10th Cir.), cert. denied, 459 U.S. 1071 (1982).....27

Carey v. Piphus, 435 U.S. 247 (1978).....38

Castaneda v. Partida, 430 U.S. 482 (1977).....13,26,39,46,48,49

Coble v. Hot Springs School Dist. No. 6, 682 F.2d 721 (8th Cir.1982).....27

County of Washington v. Gunther, 452 U.S. 161 (1981).....15,44

Dothard v. Rawlinson, 433 U.S. 321 (1977).....15

East Texas Motor Freight v. Rodriguez, 431 U.S. 395 (1979).....40

Evans v. Harnett County Bd of Educ., 684 F.2d 304 (4th Cir. 1982).....17,29,34

Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).....40,41,44-45

Furnco Construction Co. v. Waters, 438 U.S. 567 (1978).....17-18,31,32,35

Hishon v. King & Spaulding, ___ U.S. ___, 104 S.Ct. 2229 (1984).....15

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).....12,19,37,38,39,43

King v. Trans World Airlines, ___ F.2d ___, 35 FEP Cases 102 (8th Cir. 1984).....34,42

League of United Latin American Citizens v. Salinas Fire Dept., 654 F.2d 557 (9th Cir. 1981).....29,34

Lee v. Russell County Bd. of Educ., 684 F.2d 769 (11th Cir. 1982).....28,29,34

Loeb v. Textron, Inc. 600 F.2d 1003 (1st Cir. 1979).....28

Los Angeles Dep't. of Water and Power v. Manhart, 435 U.S. 702 (1978).....23,36,46

McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).....32

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973.....17,29,30,35,36

Mt. Healthy School Dist. v. Doyle, 429 U.S. 274 (1977).....32,40

Muntin v. State of Calif. Parks and Rec. Dep't., 671 F.2d 360 (9th Cir.1982).....28,30,34

Orr v. Orr, 440 U.S. 268 (1979).....24

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979).....36

Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971).....15,46

Ramirez v. Sloss, 615 F.2d 163 (9th Cir. 1980).....30

Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978).....38

Roberts v. United States Jaycees, ___ U.S. ___, 104 S.Ct. 3244 (1984).....24-25

Spagnuolo v. Whirlpool Corp., 641 F.2d 1109 (4th Cir.) cert. denied, 454 U.S. 860 (1981).....17,29

Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248 (1981) 11,17,18,28,30,31,32,33,35,37

United States Postal Service Bd. of Governors v. Aikens, ___ U.S. ___, 103 S.Ct. 1478 (1983).....31

STATUTES:

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, et. seq. .....passim

OTHER:

Committee on Occupational Classifications and Analysis, Assembly of Behavioral and Social Sciences, National Research Council, National Academy of Sciences, Women, Work,and Wages: Equal Pay for Jobs of Equal Value (D. Treiman, and H. Hartman, eds. 1981).....15

S. Fiske and S. Taylor, Social Cognition (1984).....41

Statistical Abstract of the United States, 1982-1983.....47

Taub, Nadine, "Keeping Women In

Their Place: Stereotyping Per Se As A Form of Employment Discrimination" 21 Boston Coll. L.Rev. 345 (1980).....16

U.S. Department of Labor, Bureau of Labor Statistics, Employment and Earnings, June, 1984, ...46

U.S. Department of Labor, Office of the Secretary, Women's Bureau, The Earning Gap Between Women and Men, 1979.....15

U.S. Department of Labor, Office of the Secretary, Women's Bureau, The Employment of Women: General Diagnosis of Developments and Issues, United States Report for OECD High Level Conference on the Employment of Women, April 1980.....14

Interest of Amici Curiae[1]

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization of over 250,000 members dedicated to protecting fundamental rights, including the right to equal treatment under the law. The ACLU has established the Women's Rights Project to help eliminate the pervasive problem of gender-based discrimination. It has participated in the litigation of many cases before this Court challenging sexually discriminatory practices, including in particular cases involving interpretation and enforcement of Title VII of the Civil Rights Act of 1964, as amended.

The NOW Legal Defense and Education Fund

---

[1] The parties have consented to the filing of this brief, and their letters of consent are being filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

("NOW LDEF") is a non-profit civil rights organization that performs a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was established in 1970 by leaders of the National Organization for Women. A major goal of the NOW LDEF is eliminating barriers that deny women economic opportunities. In furtherance of that goal, NOW LDEF has participated in numerous cases to secure full enforcement of laws prohibiting employment discrimination.

The Women's Legal Defense Fund is a non-profit, tax exempt membership organization founded in 1971 to provide pro bono legal assistance to women who have been discriminated against on the basis of sex. The Fund devotes a major portion of its resources to combating sex discrimination in employment through litigation of significant

employment discrimination cases, operation of an employment discrimination counseling program, and agency advocacy before the EEOC and other federal agencies that are charged with enforcement of the equal opportunity laws.

Amici believe that the opinion of the Fourth Circuit below misapplies important precedents of this Court and that, unless corrected, its interpretation will subvert congressional intent and unduly hamper aggrieved individuals in many circumstances in their legitimate efforts to enforce Title VII. Moreover, the proposition accepted by the Circuit Court that a male employer may be absolved of charges of sex discrimination against working women simply because his wife works affronts both men and women and recognizes an unauthorized and illogical defense.

Statement of the Case

In 1975, the city of Bessemer City, North Carolina decided to hire a full-time recreation director to run its community recreation program. The program was to provide recreational activities for residents of both sexes and all ages. Joint Appendix ("J.A.") 70a. Prior to this time, the recreation program had been run almost entirely by the Optimist Club, a community service organization whose membership was limited to males. J.A. 142a-143a,149a. The new recreation director was to be selected by a hiring committee, appointed by the Mayor for that purpose. J.A. 68a.

The committee had five members, 4 men and 1 woman. Of the male members, two - Butler and Nichols - were active in the Optimist Club and in the recreation program it had conducted. J.A. 142a-143a, 149a, 156a,

159a-160a.

The committee had no educational or experience requirements for the job, although they did collectively decide that residence in Bessemer City would be essential. J.A. 169a. Different committee members had different expectations as to what the job would entail. See J.A. 108a, 117a, 142a, 149a, 150a. Some committee members referred to the job as that of "athletic director," J.A.160a, although the program also included music, art, and other similar activities. J.A. 108a, 117a, 131a. No written statement of job responsibilities was formulated until after the selection process was completed. J.A.56a, 107a, 157a.

Eight people applied for the position of recreation director, J.A.111a, of whom Phyllis Anderson was the only female. The finalists for the position were William ("Bert") Broadway, Donald Kincaid, and

Phyllis Anderson.

The male members of the committee would have selected Broadway for the position except for his refusal to relocate in Bessemer City. J.A. 140a, 154a, 157a, 164a. At the time of his application, Broadway was recreation director in Cramerton, North Carolina. Broadway had two years experience in recreation; he had no college degree but had taken five college courses in physical education. He had also participated in the Optimist recreation program. He was 24 years old, with a wife and one child. J.A.73a-74a.

Donald Kincaid had a college degree in health and physical education, J.A. 62a, in conjunction with which he had done one semester of student teaching. He had participated in the Optimist recreation program, J.A. 141a, and had worked in the finance department of a credit organization for approximately one year. J.A. 62a. He

also was twenty-four years old, J.A. 134a, was married and had a child. J.A. 121a, 151a.

Phyllis Anderson graduated from high school in 1953. J.A. 58a. She married the following year and temporarily discontinued her education. J.A. 90a. While her husband was overseas in military service she worked supervising a hospital recreation program. J.A. 59a, 91a. Later, while her husband attended college, she worked as a nurse's aide and receptionist in a doctor's office. J.A. 86a, 59a. She subsequently returned to school and earned a degree from a two-year college while working part-time as a retail sales clerk. For ten years she was a substitute school teacher in all grades, until she obtained her Bachelor of Arts degree in elementary education. She then taught third grade full-time. J.A. 87a. She was also active in local civic organizations, the Exchangette Club and the Jaycette Club.

J.A. 58a, 59a. At the time of her application, she was thirty-nine years old, married, with two children. J.A.89a.

Both Butler and Nichols knew Broadway and Kincaid through the Optimist Club. J.A. 132a, 140a-141a, 149a, 156a. The two male finalists were recruited by Butler, who recruited other males as well. He knew some women he thought were qualified for the job, but did not contact them. J.A. 144a, 148a.

The male members of the committee thought Broadway's experience qualified him for the job, even though he had no college degree. J.A. 147a, 154a-155a, 159a, 163-164a. Kincaid's degree in physical education, even though he had limited experience, qualified him in the minds of a majority of the committee. J.A. 141a, 153a, 157a. Boone, who chaired the committee and was its only female member, thought Anderson was the most qualified candidate overall

because of her combined education and experience. J.A. 117a. However, male committee members refused to acknowledge the relevance of her education and experience. J.A. 150a-151a, 158a. None of the male committee members apparently credited Ms. Anderson's club activities or personal childraising experiences as having any relevance to the job even though she testified that she had shepherded two boys through numerous sporting activities. J.A. 189a-190a. In contrast, the fact that Kincaid played sports as a youth and was active in the Optimists clearly counted in his favor. J.A. 127a, 151a, 164a.

During the interviews, Anderson was asked whether her husband approved of her taking this job and whether she would be able to stay out late at night to supervise activities. J.A. 81a, 108a. No other candidate was questioned in this manner. J.A.

145a. Boone, apparently annoyed at these questions, commented facetiously to Kincaid: "and your new bride won't mind." J.A. 121a. No questions or comments relating to spouse's reactions or family responsibilities were asked of any of the other six male candidates. J.A.145a.

In explaining the decision to hire Kincaid, one committee member, Nichols, stated that he thought "it would be real hard" for a woman to do the job, and that he thought his "wife should be home at night." J.A. 158a, 161a. Another stated that he did not recruit two women he thought were qualified because, as teachers, they probably earned more than the recreation job would pay. But he was not similarly dissuaded from recruiting a male teacher, Russ Bergman, for the job. J.A. 148a-149a.

Summary of Argument

The record in this case reflects pervasive and undisguised sex discrimination. This was proved largely by direct evidence of discriminatory motive: i.e., open hostility by male committee members towards the prospect of a woman in the job in question, recruitment only of men, offensive sex-based questions posed solely to the woman applicant, and a history of overt sex discrimination. The Court of Appeals failed to recognize the critical significance of these and other unrebutted facts establishing discriminatory motive, and mistakenly applied the analysis in Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248 (1981). That analysis only applies when the plaintiff creates an inference of discrimination from circumstantial evidence, not when discriminatory motive is established

directly.

Once discriminatory intent in the employment process is shown directly, the burden shifts to the defendant to prove that the resulting employment decision was not tainted. This may not be accomplished through a simple articulation of a purportedly legitimate reason for the decision. At this stage defendant bears the burden to prove that the victim of proved discrimination was not qualified for the job or would not have been hired in any event. See International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). That burden could not have been met in this case, since there is no dispute that petitioner was qualified for the job she sought.

The Court of Appeals found that evidence that male committee members were married to women who had worked outside the home rebutted direct evidence of discrimination

against a woman applicant for employment. This conclusion is inconsistent with the principles established in Castaneda v. Partida, 430 U.S. 482 (1977) and with basic Title VII law. It is also illogical and offensive to both sexes to assume that women work only if their husbands approve, or that men's motives can be ascertained simply by observing their wives.

ARGUMENT

Introduction

Twenty years after the enactment of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, et seq. ("Title VII"), employment discrimination is still a pervasive and disruptive factor in the lives of many working women. It is measured by entrenched occupational segregation[2/] and by an intractable wage gap in the earnings of women and men: women still earn about 60 cents for every dollar earned by men[3/] and women with high school diplomas on the average earn less than men with an eighth grade education.[4/] Systematic devaluation of jobs held predominantly by women,[5/] exclusion of women from jobs traditionally reserved for men,[6/] and stereotypical notions about women's abilities and roles[7/] all contribute

---

2/ "[O]verall employment patterns of women in the United States have changed little since 1950. Of the 420-odd occupations listed by the 1950 census of occupations, women were employed primarily in 20. That fact was virtually unchanged by 1970. In 1978, only 9.9 percent of women employees held traditionally male jobs, 21.6 percent held jobs that are not sex-stereotyped, and 68.5 percent held traditionally female jobs. U.S. Department of Labor, Office of the Secretary, Women's Bureau, The Employment of Women: General Diagnosis of Developments and Issues, United States Report for OECD High Level Conference on the Employment of Women, April 1980, p.6.

3/ See generally, Committee on Occupational Classification and Analysis, Assembly of Behavioral and Social Sciences, National Research Council, National Academy of Sciences, Women, Work, and Wages: Equal Pay for Jobs of Equal Value (D. Treiman, and H. Hartman, eds. 1981).

4/ U.S Department of Labor, Office of the Secretary, Women's Bureau, The Earning Gap Between Women and Men 1979, Table 8, "Comparison of Median Income of Year-Round Full-Time Workers, by Educational Attainment and Sex, 1977 (Persons 25 years of age and over)."

5/ See County of Washington v. Gunther, 452 U.S. 161 (1981).

6/ See Dothard v. Rawlinson, 433 U.S. 321 (1977), Hishon v. King & Spaulding, ___ U.S. ___, 104 S.Ct. 2229 (1984).

7/ Phillips v. Martin-Marietta Corp., 400 U.S. 542

to the observed results.

The instant case presents a paradigm of the overt and subtle discrimination still experienced by vast numbers of working women. This record shows graphically what happens to women when they move away from more accepted forms of "women's work" and apply for jobs which women have traditionally not held. In Anderson's case, the effort was met with outright resistance to the notion of a woman in the job she sought.

I. Burdine Does Not Govern A Case, Such As The Present One, In Which There Is Direct Evidence Of Intentional Discrimination

The Court below failed to acknowledge the direct evidence of discriminatory motive in the trial record and, in rote-like

(1971). See generally, Taub, Nadine, "Keeping Women In Their Place: Stereotyping Per Se As A Form of Employment Discrimination," 21 Boston Coll. L.Rev. 345 (1980).

fashion, applied an analysis inappropriate in such a case. The Fourth Circuit in this case[8] tried to force these facts into the "disparate treatment" model characterized by such cases as Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248 (1981) and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). That model, however, at best provides only a starting point for an analysis in a case such as this where direct evidence of bias is apparent.

The Burdine analysis is applicable where plaintiffs, in order to establish a prima facie case, rely on circumstantial evidence supporting the inference of discrimination.

8/ Within the Circuit, there is contradictory case law as to the analysis of cases presenting direct evidence of intent to discriminate. See Spagnuolo v. Whirlpool Corp., 641 F.2d 1109 (4th Cir.) cert. denied, 454 U.S. 860 (1981) and Evans v. Harnett County Bd. of Educ., 684 F.2d 304, 306-07 (4th Cir. 1982).

As explained in Furnco Construction Co. v. Waters, 438 U.S. 567,577 (1978), the prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Thus, the Court said in Burdine that "the allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." 450 U.S. at 254 n.8. Proof of discriminatory motive is the end-point contemplated by the Burdine analysis.

In the present case, the "consideration of impermissible factors" was not "elusive"; it was apparent.[9/] The record is clear that

[9/] The assertion of a non-discriminatory reason supporting the decision not to hire Anderson does not eliminate the existence of discriminatory motive or

but for her sex, Anderson's interview and application would have been handled differently.

At the time Phyllis Anderson applied for the position of recreation director of Bessemer City in 1975, she was almost 40 years old. She had taught school in various grades and under varied circumstances for approximately twelve years. She had worked with young and old people, teaching them sports and other recreational activities. She had earned a college degree, raised children, and participated in community activities. She was and is unquestionably a

resolve the matter. Evidence of intent may deprive the non-discriminatory explanation of credibility or reveal it to be pretextual. In either event, direct evidence of intentional discriminatory motive or other proof of discriminatory intent markedly alters the defendant's posture to that of a "proved wrongdoer." International Brotherhood of Teamsters v. United States, 431 U.S. 324,360 n.45 (1977). The burden then shifts to the defendant to prove that the ultimate decision was not tainted by discrimination. See Point II, infra.

woman with energy, initiative, a range of abilities, and breadth of experience, all of which was obtained within the confines of traditionally female activities.

In response to Anderson's application to be recreation director, a male committee member inquired into her husband's views, asked whether she could stay out late at night, and questioned the ability of a woman to do the job.[10/]

The recreation program Anderson sought to direct had previously been conducted by the male-only Optimist Club. Two committee

---

10/ The district court found that Anderson was the only candidate seriously questioned about whether her family responsibilities would interfere with job performance, and characterized a remark by Boone, the sole woman on the selection committee, to Kincaid about whether his wife would mind as "facetious." The record supports this interpretation, see J.A. 120a-121a.

In any event, such an inquiry is highly suspicious. There is no dispute that other male candidates were not asked similar questions, or that a male committee member made the inquiry of Anderson alone.

members, Butler and Nichols, "just about ran" the Optimist program. J.A. 156a. Broadway and Kincaid, the male candidates who were preferred by the committee, had both been active in the Optimist recreation program. Thus, Broadway and Kincaid had gained experience with the prior recreation program through their affiliation with the Optimists, and committee members had the opportunity to meet, socialize and observe them in that context. Anderson, solely because she is a woman, was excluded from these opportunities.

The question to Anderson about her spouse's reaction, and the statement that "it would be real hard" for a woman to do the job, standing alone, provide direct evidence of discriminatory motive. They reveal an attitude that a woman's application had to be evaluated differently. The attitude is grounded in the supposition that any woman, by virtue of her sex, stands in a "special"

relationship to employment, particularly non-traditional employment. This view posits that a woman is dependent on her husband's approval and support and would not contravene his wishes;[11] that a woman has primary responsibility for childrearing and household maintenance, to which employment responsibilities are subordinated. In contrast, none of these considerations is present when a man applies for a job.[12]

These inquiries and comments are not minor, innocent remarks. They are instead highly significant direct evidence that a

[11] Men, no less than women, may be influenced by their spouse's opinions. This was apparently the message Boone's remark to Kincaid was intended to convey. However, the framing of the question to Anderson alone, by a male committee member, reveals his view that only women are constrained in this fashion.

[12] These notions contribute to the perception of women as marginal, unreliable workers. See, e.g., Phillips v. Martin-Marietta Corp., 400 U.S. 542.

different standard of review and a different set of assumptions accompanied the evaluation of a female applicant for employment. This is precisely the evil Title VII forbids.

The truth or falsity of this kind of sex-based generalization is irrelevant. As this Court stated in Los Angeles Dep't. of Water and Power v. Manhart:

> Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply . . . [T]he statute requires that we focus on fairness to individuals rather than fairness to classes. Practices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals.

435 U.S. 702, 708-09 (1978). In the present case there is no evidence that Anderson's husband's views or family responsibilities would interfere in any way with her job

performance, nevertheless some committee members presumed they would. Similarly, there was no evidence that Kincaid's or Broadway's family responsibilities or wife's opinions would not interfere with their job performance, but that possibility was never considered.

This Court has often condemned, in a variety of contexts, reliance on the "baggage of sexual stereotypes" which are used to classify, limit, protect or otherwise needlessly differentiate between men and women, to the historical disadvantage of women as a class. Orr v. Orr, 440 U.S. 268,283 (1979). Only recently this Court disapproved

> discrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes [which] forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives persons of their

> individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.

Roberts v. United States Jaycees, ___ U.S. ___, 104 S.Ct. 3244, 3253 (1984).

The remarks to and about Anderson, offensive as they may be, do not stand alone. They occurred in a context in which overt sex discrimination had been openly embraced. Recreation in Bessemer City had been controlled by a male-only club, whose members and participants were prominent both on the selection committee and among the preferred candidates. The "men's club" atmosphere pervaded the committee's activities, notwithstanding Ms. Boone's complaints,[13] and was evidenced in Butler's openly discriminatory recruitment practices, in

---

[13] Boone charged repeatedly that the committee was biased against Anderson because of her sex, a charge the male committee members did not even answer. J.A. 166a.

Nichols' references to the "athletic" director and to male-dominated competitive team sports, J.A. 116a, 142a, and in the male committee members' preference for candidates with training and experience similar to theirs. The men who had controlled recreation in Bessemer City looked for "one of the boys" to carry on their tradition.

Like the supervisory ranking system condemned in Albemarle Paper Co. v. Moody, 422 U.S. 405, 433 (1975), the subjective nature of this process, with no clearly defined job duties and functions, requirements, or credentials permitted committee members to act on their personal biases. Because they offer an easy opportunity to discriminate, many courts rightly regard subjective employment decisions with great suspicion. See Castaneda v. Partida, 430 U.S. 482, 497 (1977) (a "highly subjective . . . . system is subject

to abuse as applied," even if it is not unlawful per se).[14/] In the present case, the absence of a job description or defined qualifications permitted committee members to shift criteria, depending on the preferred candidate of the moment. Thus, when Broadway was favored, experience was deemed qualifying and education was not viewed as essential; however, when Broadway was disqualified and Kincaid was the only remaining male candidate, his education was cited as a reason for his superiority over a female with greater experience. In each instance, the reasons for the preference shifted to match whatever qualifications the male candidate possessed.

14/ See also, e.g., Boykin v. Georgia Pacific Corp., 706 F.2d 1384 (5th Cir. 1983), cert. denied, ___ U.S. ___, 104 S.Ct. 999 (1984), Coble v. Hot Springs School Dist. No. 6, 682 F.2d 721 (8th Cir. 1982), Burrus v. United Tel. Co. of Kansas, 683 F.2d 339 (10th Cir.), cert. denied, 459 U.S. 1071 (1982).

Thus, the trial record in this case contained overt expressions of preference for a male, suspicious and suggestive questions seriously posed only to the female applicant, admissions of stereotypical views on women's proper role, a history of sex-segregation in the job, shifting criteria, and a subjective decision-making process. This was more than sufficient to establish a case of intentional discrimination based largely on direct evidence, not inferences. Faced with less compelling facts, lower courts have so concluded,[15] and have recognized the inapplicability of the Burdine - type analysis. See, e.g., Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979) (that approach

[15] See Bell v. Birmingham Linen Service, 715 F.2d 1552 (11th Cir. 1983), cert. denied, ___ U.S. ___, 52 U.S.L.W. 3844 (U.S. May 22, 1984), Lee v. Russell County Bd. of Educ., 684 F.2d 769, 774 (11th Cir. 1982), Muntin v. State of Calif. Parks and Rec. Dep't., 671 F.2d 360 (9th Cir. 1982).

inapplicable when plaintiff relies on direct evidence of discrimination); Lee v. Russell County Bd. of Educ., 684 F.2d 769, 774 (11th Cir. 1982) (constitutional challenge) ("where the evidence consists, as it does here, of direct testimony that defendants acted with a discriminatory motivation, if the trier of fact believes the prima facie evidence the ultimate issue of discrimination is proved; no inference is required"); Evans v. Harnett County Bd. of Educ., 684 F.2d 304, 307 (4th Cir. 1982) (intentional discrimination warrants shifting burden of persuasion to defendant); Spagnuolo v. Whirlpool Corp., 641 F.2d 1109 (4th Cir.), cert. denied, 454 U.S. 860 (1981) (reliance on direct evidence of intent makes it unnecessary to prove pretext; McDonnell-Douglas analysis does not apply); League of United Latin American Citizens v. Salinas Fire Dept., 654 F.2d 557, 559 (9th Cir. 1981) ("where, as here, the plaintiff

has proved intentional discrimination, Burdine no longer applies"); Ramirez v. Sloss, 615 F.2d 163, 169 n.10 (9th Cir. 1980) (McDonnell Douglas does not apply when plaintiff "has already shown intentional discrimination by direct evidence"). [16]

[16] Even when Burdine is applied to analyze cases involving direct evidence of discriminatory motive, the result must be the same. See, e.g., Muntin v. State of Calif. Parks and Rec. Dep't., 671 F.2d at 363: direct evidence of intentional discrimination "not only permits, but compels, an inference" that the the defendant discriminated. Thus, no "explanation could be sufficient, as a matter of law, to justify a judgment that unlawful discrimination did not occur." While amici submit that it would be more appropriate to acknowledge the inapplicability of Burdine to this situation, this analytical difference of opinion is of no import in the Muntin case, since the same result was obtained. The critical distinction between Muntin and the decision below is the Fourth Circuit's failure to recognize the crucial significance of direct evidence of intent, thus permitting it to accept, as the Ninth Circuit refused to do, an "explanation" insufficient as a matter of law. Because of the potential for this kind of error in application of the Burdine type analysis, used in almost all individual Title VII cases, amici believe that clarification of the limits of Burdine is urgently needed.

II. Unrefuted Direct Evidence of Discriminatory Motive Establishes Title VII Liability Which Cannot Be Avoided by Mere Articulation of A Purportedly Legitimate Reason for Challenged Conduct

As stated above, under Burdine a defendant may dispel the inference of discrimination based on circumstantial evidence simply by articulating a legitimate non-discriminatory reason for its conduct. The plaintiff, to prevail, must prove that the proferred reason is pretextual, or otherwise undermine its credibility. See also United States Postal Service Bd. of Governors v. Aikens, ___ U.S. ___, 103 S.Ct. 1478 (1983). Plaintiff's "ultimate burden," Burdine, 450 U.S. at 253, is to establish that "consideration of impermissible factors" underlaid the employer's decision. Furnco Constr. Co. v. Waters, 438 U.S. at 577.[17]

[17] In the Title VII context, the Court has condemned the use of race or sex as "a factor." International Brotherhood of Teamsters v. United States, 431 U.S.at 335 n.15 (1977) (emphasis added). See also Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S.

In this case, plaintiff proved through direct evidence that the defendant considered "impermissible factors" in hiring the recreation director. Under Burdine and Furnco she had thus satisfied her ultimate burden, and the kind of defense those cases contemplate was no longer availing. It was thus improper for the circuit to permit defendant's mere articulation of another

---

252,265-66 (1977) ("where there is proof that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference is no longer justified.") But see McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282 n.10 (1976) (plaintiff can prevail if shown that race was a "but for" factor). In Mt. Healthy School Dist. v. Doyle, 429 U.S. 274 (1977), a First Amendment case, this Court noted with apparent approval the lower court's requirement that the alleged constitutional infringement be a "substantial" factor in the employment decision. Some courts have used the "substantial factor" and "but for" language interchangeably. E.g. Bundy v. Jackson, 641 F.2d 934,942 (D.C. Cir. 1981). This issue need not be reached in this case, since by any standard Anderson's proof was adequate. See pp. 19-22, 25-28, supra.

reason for its decision to rebut plaintiff's showing of intentional discrimination.[18/]

In Bell v. Birmingham Linen Service, 715 F.2d 1552 (11th Cir. 1983), cert. denied, ___ U.S. ___, 52 U.S.L.W. 3844 (U.S. May 22, 1984), the plaintiff's request for a job transfer elicited a supervisor's remark that if he granted the request, "every woman in the plant would want" the same job. Id. at 1553. The Court noted the unavailability of the Burdine - type defense to cases presenting direct evidence of bias:

> If the evidence consists of direct testimony that the defendant acted with a discriminatory motive, and the trier of fact accepts this testimony, the ultimate issue of discrimination is proved. Defendant cannot refute this

---

18/ Moreover, the articulated reason, Kincaid's college degree in physical education, in any event related only to the hiring decision, but failed altogether to address the openly discriminatory treatment accorded Anderson in the application and interview process. See pp. 41-4, infra.

> evidence by mere articulation of other reasons; the legal standard changes dramatically. . . .

Id. at 1557. Thereafter, the burden shifts to defendant to prove "'that the same decision would have been reached even absent'" the discrimination. Id. (Citations omitted.) 19/

As the Eleventh Circuit noted in Bell, it would be "illogical" and "ironic," id. at 1556, if direct evidence of motive or conduct forbidden by Title VII could be negated by the mere articulation, but not proof, that the employment decision was undertaken for permissible reasons. It is just this kind of

19/ Accord: Evans v. Harnett County Bd. of Educ., 684 F.2d at 306-07, Lee v. Russell County Bd. of Educ., 684 F.2d 769, 774 (11th Cir. 1982) (constitutional challenge), League of United Latin American Citizens v. Salinas Fire Dep't., 654 F.2d 557, 559 (9th Cir. 1981). See also King v. Trans World Airlines, ___ F.2d ___, 35 FEP Cases 102, 104 (8th Cir. 1984) and Muntin v. State of Calif. Parks and Rec. Dep't., 671 F.2d at 363.

illogic and irony that the Fourth Circuit has embraced in this case. Notwithstanding that the analyses in McDonnell Douglas, Burdine, and Furnco were all intended to aid courts in ascertaining the existence of discriminatory motive where it is denied and hidden, and therefore not subject to direct proof, the opinion below ignores overt discrimination and gives it no legal significance. If this were the law, plaintiffs could virtually never prevail in individual Title VII cases: an employer who admits to unlawful motivation can almost always articulate some other reason, as well, for a decision. Unless the facts conveniently provide analogies for the plaintiff, in the way of similarly situated employees or applicants of different races or sexes who were treated differently, pretext may be impossible to prove and proof of unlawful motive would be unavailing.

Prior decisions indicate this Court's unwillingness to dismiss so lightly proof of discriminatory motive or to exonerate so easily employers whose decisions appear, by this evidence, to be tainted.[20/] Decisions of this Court have repeatedly admonished that in Title VII "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. at 707 n.13. See also McDonnell Douglas Corp. v. Green,, 411 U.S. at 801: "Title VII tolerates no . . . discrimination, subtle or otherwise."

20/ As this Court has recognized in another context:

> Invidious discrimination does not become less so because the discrimination accomplished is of a lesser magnitude. Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not.

Personnel Administrator of Massachusetts v. Feeney 442 U.S. 256,277 (1979) (footnote omitted).

Class-wide disparate treatment cases provide guidance in implementing this congressional purpose in cases like the present one in which Burdine ceases to apply. In such cases, proof of discriminatory motive is commonly inferred from a combination of statistical data and individual experiences. "[P]roof of the pattern or practice supports an inference that any particular employment decision . . . was made in pursuit of that [discriminatory] policy." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 362 (1977). Proof of a pattern or practice of discrimination, under accepted Title VII doctrine, constitutes proof of discriminatory motive. See id. at 335 n.15. Proof of discriminatory motive, in turn, "change[s] the position of the employer to that of a proved wrongdoer." Id. at 360 n.45. All this may occur without any inquiry into the

qualifications of a particular individual for a particular position.[21] In bifurcated proceedings normally used in Title VII class suits, attention is focussed during the initial "liability" stage on the issue of intent or motive.[22] Once that is found, an individual plaintiff or class member enjoys "a rebuttable presumption in favor of individual relief," id., and the burden shifts to the "employer to demonstrate that the individual applicant was denied an

[21] The Teamsters opinion notes that the absence of individual injury flowing from discriminatory conduct is a question not relating to liability but to relief. 431 U.S. at 342-43 n.24.

[22] This Court has approved in other analogous contexts separating the question of liability from that of remedy in individual cases. Regents of the Univ. of California v. Bakke, 438 U.S. 265, 280 n.14 (1978) (Powell, J., for the Court) (whether Bakke would have been admitted goes to the issue of relief, not liability). See also Carey v. Piphus, 435 U.S. 247, 266 (1978) (the right to due process is "absolute" and "does not depend on the merits of the substantive claim").

employment opportunity for lawful reasons." Id. at 362.[23]

There is no reason why a plaintiff in an individual disparate treatment case who has proved discriminatory motive should receive less protection from Title VII than plaintiffs and class members do in class-wide challenges. In individual cases, proof of motive may be more difficult to elicit, especially if the size of the employer's operation makes statistical proof unavailable or unpersuasive. However, once motive has been shown by whatever means available, a presumption should arise favoring individual relief in either an individual or class

[23] This burden could not be satisfied simply by asserting that the best qualified candidates had been hired. Teamsters, 431 U.S. at 342-43 n.24. Likewise, in constitutional cases this Court has found "simple protestations" that discrimination did not affect the result "insufficient." Castaneda v. Partida, 430 U.S. 482, 498 n.19 (1977). Accord, Alexander v. Louisiana, 405 U.S. 625, 633 (1972).

action. The burden then falls to the employer to prove that the plaintiff was not qualified, would not have been hired anyway, etc.[24/]

In the present case, the trial record reveals that Bessemer City did not and could not meet this burden. There is no dispute that Phyllis Anderson was qualified for the job she sought. Her education equaled and her experience far outstripped that of her male competitors. The job as ultimately defined after-the-fact was one for which her education and experience were highly relevant. The objective comparisons between

[24/] See East Texas Motor Freight v. Rodriquez, 431 U.S. 395, 403 n.9 (1979) and Franks v. Bowman Transp. Co., 424 U.S. 747,773 n.32 (1976). Similarly, in constitutional challenges to employment decisions, once an unconstitutional factor has tainted a decision-making process, the burden shifts to the employer to prove that the same decision would have been reached even without the presence of that factor. Mt. Healthy School District v. Doyle, 429 U.S. 274.

Anderson and Kincaid or Broadway alone suggest that discrimination played a major or determinative role. The direct evidence of bias makes that conclusion inescapable. Because female sex-role stereotypes were so strongly embedded in the minds of committee members, impermissible factors could never be convincingly disentangled from the process that actually occurred.[25/]

Not only did Bessemer City fail to prove

[25/] The burden is on defendant to prove that it would have made the same decision absent discrimination, not that it could have. Franks v. Bowman Transp. Co., 424 U.S. at 773 n.32.

Amici suggest that in cases presenting direct evidence of discrimination, the motives of discriminators can rarely be disentangled from the decision sufficiently to prove that the same decision would have been made anyway. This Court has recognized the difficulty of parsing out motives with such fine precision. See, e.g., Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. at 265-66. In discrimination cases, imposition of this heavy burden on proved wrongdoers is appropriate, since personal sex or race-based bias tends to taint the entire process it touches. Id. And see generally, S. Fiske and S. Taylor, Social Cognition, 139-54, 159-67, 171-73 (1984).

that its hiring decision was not influenced by proved bias, but it failed altogether to explain the different treatment accorded Anderson in the application and interview process. The Eighth Circuit has found such a failure fatal to a defendant's claims. In King v. Trans World Airlines, Inc., ___ F.2d ___, 35 FEP Cases 102 (8th Cir. 1984), the plaintiff applied for a job, was interviewed, and subsequently denied employment. In the course of her interview she was asked questions, not asked of male applicants, about her marital status, her children, childcare arrangements and childbearing plans. The employer did not deny that the questions were asked but contended that the denial of employment was based on legitimate non-discriminatory reasons. The Eighth Circuit held that these articulated reasons did not address the discrimination in the application and

interview process, as to which no explanation was offered. The failure to explain this overt difference in treatment subjected it to liability under Title VII[26/] and entitled plaintiff to declaratory and injunctive relief. A remand was required to determine whether she might also obtain backpay, and on remand the burden shifted to defendant to prove that unlawful discrimination had not accounted for its action.

All of these opinions indicate that proof of discriminatory motive radically alters the position of the Title VII defendant to that of a "proved wrongdoer." By separating out the issue of liability and relief, as this Court has traditionally done in Title VII class cases, it becomes possible

---

26/ Similary, in Teamsters, the Court noted that a violation would be established if women are "not considered and hired on the same basis that [men] were considered and hired." 431 U.S. at 917. (emphasis added).

to adjust the burden on the defendant in accord with its changed status. Proof of bias creates liability and a presumption in favor of relief. It does not automatically compel a remedy in an individual instance, but the employer does and should bear the heavy burden to prove that the applicant or employee who was subjected to a discriminatory practice did not actually suffer as a result.

Shifting of the burden of proof to a defendant comports with the Court's recent admonition that it will "avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without a clear congressional mandate." County of Washington v. Gunther, 452 U.S. 161,178 (1981). Moreover, in this situation, "[n]o reason appears . . . why the victim rather than the perpetrator of the illegal act should bear the burden of proof on this

issue." Franks v. Bowman Transp. Co., 424 U.S. at 773 n.32.

III. Marriage to A Working Woman Does Not Rebut Direct Evidence of A Man's Discriminatory Motivation

The Court of Appeals found that any inference of bias by male members of the selection committee against a woman applicant for recreation director was dispelled by the fact that "[a]ll four testified that their wives had worked and were accustomed to being away from home during evening hours." 717 F.2d at 155 n.5, Pet. App. 61a n.5. The notion that intentional discrimination evidenced by the sex-based inquiries and remarks and by disparate recruitment practices was rebutted by evidence that the wives of committee members worked, and that therefore those committee members were not biased against working women, defies logic, contravenes the holding of this Court in

Castaneda v. Partida, 430 U.S. 482 (1977), and offends basic Title VII concepts. Phillips v. Martin-Marietta Corp., 400 U.S. 542, Los Angeles Dep't. of Water & Power v. Manhart, 435 U.S. 702.

Dubbed by petitioner as the "working wife defense," such a notion would effectively insulate all men whose wives have ever worked from any charge of intentional sex discrimination in employment.[27] The notion is more than absurd; in its suggestion that women do only those things of which their husbands approve, or that men necessarily agree with their wives'

[27] The Bureau of Labor Statistics reports that in June, 1984, of married men in the civilian labor force 61.9% had wives who were also currently in the civilian labor force. This of course does not include those married men whose wives were previously but are not currently in the labor force. See U.S. Department of Labor, Bureau of Labor Statistics, Employment and Earnings, June, 1984, Table A-10, p.39.

activities, it offends both sexes. Women are no longer subject to the legal or social control of their male relatives, nor does the institution of marriage create a single indissoluble entity with a unitary mind. Both partners have an independent identity, and each is free to do things the other disapproves of or dislikes. Thus, women may work without their husband's consent, and men may discriminate without their wives' support.

More than half of all married women work.[28] Many do so out of economic necessity rather than ideology. The fact that a woman works therefore carries little or no ideological significance, and even if it did, any significance in that regard would be

[28] Statistical Abstract of the United States 1982-83, p. 382, table 638.

attributable solely to the woman herself. In short, it is totally irrelevant to the question of discriminatory motive that a man's wife works. To say otherwise is to adopt the same biased assumptions embraced by members of the selection committee in this case - that Phyllis Anderson could not undertake the recreation director job without her husband's approval.

This Court has recognized the illogic in the Court of Appeals' approach. Castaneda v. Partida rejected the proposition that individuals do not discriminate against other members of a class to which they also belong:

> Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group.

430 U.S. at 499.

The present case is even more compelling. The assumption endorsed by the Fourth Circuit is not the simple linear one postulated in Castaneda. Here, motivations are being ascribed to one person because of the activities of a different person. We know nothing whatever about the reasons committee members' wives worked, or even their own subjective feelings about working. They may have themselves preferred the traditional female role of housewife and mother but have been compelled to work out of economic necessity. Or they may have felt gratified, stimulated and liberated by work outside of the home. The motivations of the wives are a complex matter alone, and may or may not have influenced their spouses. However, it is absurd to travel this road yet another step and attempt to deduce from the single fact of wives' employment that their husband's motivations were pure when they

rejected a different unrelated woman for a job of a type their wives had never held.

It is also clear that without more information one cannot infer motive simply from observing behavior. Among other things, a fact-finder would need to know the cost to an individual, e.g., economic and emotional, of a particular course of conduct. A man's attitude toward his own wife working may vary depending upon the amount of income she can bring to the family unit, the amount of extra housework or other responsibilities, if any, which might fall to him, etc. By contrast, the potential costs of discriminating against some other woman in the employment context might be too abstract, uncertain, or distant to affect behavior.

In sum, wives' activities are wholly irrelevant to their husbands' subjective motivation. The non-sequitur adopted by the Court of Appeals to insulate the acts of men

who openly expressed bias towards a woman as recreation director must be rejected. It would make almost as much sense to conclude that men can never discriminate against women since all men have mothers.

CONCLUSION

For the foregoing reasons, amici respectfully submit that the judgment of the Court of Appeals below should be reversed.

Respectfully submitted,

JOAN E. BERTIN
Counsel of Record
E. RICHARD LARSON
BURT NEUBORNE
ISABELLE KATZ PINZLER
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Attorneys for Amici Curiae

Dated: New York, New York
August 15, 1984

RESPONDENT'S

BRIEF

Office - Supreme Court, U.S.
FILED
OCT 4 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1623

In The

Supreme Court of the United States

October Term, 1983

PHYLLIS A. ANDERSON,

Petitioner,

vs.

CITY OF BESSEMER CITY,

Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

BRIEF FOR RESPONDENT

ARTHUR C. BLUE, III
HENRY M. WHITESIDES
WHITESIDES, ROBINSON & BLUE
246 West Main Avenue
Gastonia, NC 28053

PHILIP M. VAN HOY*
MULLINS & VAN HOY
1001 East Boulevard
Charlotte, NC 28203
(704) 377-6022

EUGENE GRESSMAN
School of Law
University of North Carolina
Chapel Hill, NC 27514

Counsel for Respondent

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

QUESTION PRESENTED

The respondent does not accept the Questions Presented by the petitioner. Respondent believes there is only one proper Question presented to this Court:

Whether, under the record evidence in this case, the Court of Appeals for the Fourth Circuit properly concluded that the District Court's critical findings of fact were "clearly erroneous" within the meaning of Rule 52(a).

TABLE OF CONTENTS

	Pages
Question Presented	i
Statement of the Case	1
A. The Nature of the Case	1
B. The Trial Proceedings	7
C. The appellate proceedings	20
Summary of Argument	23
Argument:	
I. Rule 52(a) authorizes appellate courts to review the entire record to determine if a trial court's findings of fact are "clearly erroneous."	25
II. The Fourth Circuit followed Rule 52(a) standards in examining the entire record and in holding that the District Court's findings of fact were unsupported by the record and thus were "clearly erroneous."	30
A. Questioning of applicants about willingness to work at night	31
B. Relative Qualifications of Anderson and Kincaid	32
C. Selective recruiting by Selection Committee	33
III. To the extent that findings of fact depend upon credibility determinations, an appellate court is not relieved of its Rule 52(a) duty to determine if such findings are "clearly erroneous."	37
IV. Whether there is a "working wife defense" to an alleged employment discrimination on the basis of sex is not in issue in this case.	41
V. Close appellate scrutiny of this record was necessary because of the manner in which the findings of fact and conclusions of law were prepared.	46
Conclusion	49
Appendix A	1a
Appendix B	5a

TABLE OF AUTHORITIES

Cases:	Pages
Aikens v. Postal Service, 453 U.S. 902 (1981)	37
Bose Corp. v. Consumers Union of United States, 104 S.Ct. 1949 (April 30, 1984)	26, 27
Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979)	27
Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979)	41
Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981)	45
Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978)	26
Furnco Const. Co. v. Waters, 438 U.S. 567 (1978)	32, 37
Inwood Laboratories v. Ives Laboratories, 456 U.S. 844 (1982)	26, 29
Kelly v. Southern Pacific Co., 419 U.S. 318 (1974)	27
Miller v. Mercy Hospital, Inc., 720 F.2d 356 (4th Cir. 1983)	30, 31, 40, 41, 48
Pullman-Standard v. Swint, 456 U.S. 273 (1982)	25, 28, 29
Roberts v. Ross, 344 F.2d 747 (3d Cir. 1965)	47, 48
Sweeney v. Board of Trustees, 439 U.S. 24 (1978)	37
Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981)	32, 34, 37
United States v. Crescent Amusement Co., 323 U.S. 173 (1944)	46
United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964)	46, 47
United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974)	46
United States v. United States Gypsum Co., 333 U.S. 364 (1948)	21, 26, 27, 31

TABLE OF AUTHORITIES—Continued

	Pages
Youakim v. Miller, 425 U.S. 231 (1976)	45
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969)	26
OTHER AUTHORITIES:	
42 U.S.C. §2000e *et seq.*	1
C. Wright and A. Miller, *Federal Practice and Procedure*, Vol. 9, pp. 729-731, 735 (1971)	28, 31, 41, 42
Title VII, Civil Rights Act of 1964	1
Rule 52(a), Federal Rules of Civil Procedure	Passim

BRIEF FOR RESPONDENT

The respondent does not repeat the sections of petitioner's brief entitled Opinions Below, Jurisdiction, and Statute and Rule Involved. But respondent does differ with the petitioner as to the Questions Presented.

Because respondent believes that petitioner's Statement of the Case is incomplete and in some respects inaccurate, a rather detailed counter Statement of the Case is presented herein. In addition, the Appendix A to this brief, 1a-4a, contains a summary of the major inaccuracies found in Petitioner's Statement of the Case.

STATEMENT OF THE CASE

A. The Nature of the Case

This action was filed by the petitioner Anderson on May 18, 1981, in the United States District Court for the Western District of North Carolina, Charlotte Division. Her complaint alleged that the respondent City of Bessemer City, North Carolina ("the City"), had violated the sex discrimination proscriptions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*, when in 1975 it had selected the City's first paid Recreation Director. Specifically, she asserted that the City had discriminated against her "on the basis of her sex by denying her the position of Recreation Director and awarding the position to a less qualified male" [one Donald Kincaid]. J.A. 3a.

The case came to trial without a jury on September 13 and 14, 1982, before District Judge James B. McMillan. Seven witnesses testified, two for the plaintiff Anderson and five for the City:

Plaintiff's witnesses	The City's witnesses
1. Phyllis Anderson, the plaintiff.	1. Donald Kincaid, the successful applicant.
2. Leona ("Auddie") Boone, the female chair of the five-member Selection committee. At the time of trial in 1982, she was manager of Family Dollar Stores in Charlotte, N.C., where she had previously clerked and managed. In 1975, she had been employed by a T-shirt manufacturer. J.A. 105a-106a. At that time she also served by appointment on the City Council of Bessemer City, being chairperson of the City's Recreation Department. Several times she had been defeated for election to the City Council. J.A. 106a.	2. Josiah Butler, a male member of the Selection Committee. He had been a high school athletic coach for 6 years, and, while serving as youth activities director of the Bessemer City Optimist Club for 8 years, had entire responsibility for operating the City's earlier recreation program. He holds a college degree in physical education. While operating the City's program, Butler worked with Donald Kincaid (the eventual successful applicant) in various recreational activities. Butler's own wife worked at night. J.A. 138a-147a.
	3. William H. McClellan, a male member of the Selection Committee. In 1975, he was also a member of the City's Recreation Committee; in addition, he had responsibility for operating the Bessemer City United Fund's recreation center. His wife had worked during 10 years of their marriage on a night-shift, and for another 5 years during the day, in heavy industry. J.A. 152a-155a.
	4. Eugene Nichols, a male member of the Selection Committee. In 1975, he was the youth director of the Bessemer City Optimist Club, which then ran the City's recreation program. He was also on the City's Recreation Committee. His wife had worked throughout their 20-year marriage. J.A. 156a-159a.
	5. Timothy Helms, a male member of the Selection Committee. In 1975 he was a member of the City Council of Bessemer City. His spouse had worked during the early years of their marriage, including night shifts. J.A. 163a, 167a.

The trial testimony and documentary evidence established the context in which the sex discrimination claim arose. Early in 1975 the City decided to expand the recreational program that it offered to its citizens and to select and employ its first paid Recreation Director. Until that time, the City's program had been conducted on a volunteer, unpaid basis by members of the local Optimist Club and various other individuals. The City's mayor accordingly appointed a Selection Committee composed of the aforementioned four men and one woman. The female member of the Committee, Leona "Auddie" Boone, was appointed chairperson. J.A. 68a-69a.

Although the City did not establish any formal educational or experience requirements for the position, the Selection Committee members all testified that they were seeking the person who had the best background to administer a city recreational program. They also agreed informally that the Recreation Director should reside in Bessemer City. The position was advertised in the local newspaper and by word-of-mouth.

Petitioner Anderson testified that she first heard of the matter "through the Gastonia Gazette and, as I was downtown one day shopping, I ran into Ms. Boone, Ms.

Auddie Boone, and I realized she was on the City Council; therefore, I asked Ms. Boone if anyone could apply for the job, and she stated that they could." J.A. 78a. Anderson also testified that, before she applied for the position, she chanced to converse with the City's Superintendent of Water Works (J.A. 94a), Neil Barnes (who was not a member of the Selection Committee) who stated to her "that the job was pretty well wrapped up because Donnie Kincaid was—had already been more or less accepted from the committee . . . he didn't see any sense of me applying for the job." J.A. 79a. The District Court found (Pet.App. 10a) that "[i]n response to that conversation" with Neil Barnes, Anderson included the following paragraph in her application letter to the Selection Committee (see J.A. 57a):

> I realize you will probably be giving stronger consideration for a male to fill this position. In this light, I would request that you review all qualifications equally, realizing women are assuming positions of leadership and responsibility in industry and government equal to those held by men.

Boone herself testified that she had sought out Anderson before the interviewing process began and talked to her about the job. J.A. 113a-114a. When asked whether she knew if anyone had encouraged any member of the Committee to vote for a particular person before the time of the interviews, Boone replied that she simply had a "woman's intuition" that "it had already been settled, that Mr. Kincaid had the job before we ever went to the interviews." J.A. 114a.

In addition, sometime before the interviewing process began, Boone had an informal conversation in her shop with Josiah Butler, one of the male members of the Selection Committee. During that conversation, according to Butler's testimony, Boone remarked that it looked like

the choice was going to be between Anderson and Kincaid, and that Kincaid should not have the job "because of his family . . . his family had run the town long enough." J.A. 143a, 146a, 147a. When queried at trial about these remarks, Boone professed no memory of such a conversation with Butler—"That's been too many years ago." J.A. 118a. While she then proceeded to deny having stated that she could not vote for Kincaid "because his family had run Bessemer City long enough," she tempered the denial by stating that she had not made such a remark "in those words." J.A. 118a. Nor could she "recall" whether she had told Butler at that time that "it looks like it will be between Kincaid and Anderson," although she did acknowledge that she then "thought they were the best qualified." J.A. 119a.

Eight persons, including Anderson and Kincaid, applied for the position, Anderson being the sole female applicant. All eight applicants were interviewed by the entire Selection Committee on the evening of March 25, 1975. At the start of each interview, the applicant either made a statement or read his or her resume, copies of which were available to the Committee. One of the Committee members, Timothy Helms, testified that Anderson began her interview with "a very negative type statement that indicated she would not be hired simply because she was a woman." J.A. 165a, 169a. At the conclusion of the interviews, the Committee unanimously decided that two male candidates (Bert Broadway and Kincaid) and the one female candidate (petitioner Anderson) were qualified for the position; the other five male candidates were deemed unqualified. The chairperson, Auddie Boone, testified that before the interviewing process had begun she thought that Kincaid and Anderson "were the best qualified." J.A. 119a.

Initially, Broadway was considered by all five Committee members—including chairperson Auddie Boone—to be the best qualified of the three finalists, because he was then the Recreation Director of Cramerton. N. C. But since Broadway had indicated during his interview that he would not relocate to Bessemer City, he was dismissed from consideration. During the ensuing discussion among the Committee members as to the relative merits of Anderson and Kincaid, Mr. Helms testified (J.A. 166a) that

> Auddie [Boone] sat on my right and kept telling me the only reason we weren't considering Ms. Anderson was because she was a woman. I told Auddie that it was irrelevant whether Ms. Anderson was a woman or not, but Auddie was very audible about that.

No other Committee member made any such comments about preference for either candidate because of sex. J.A. 167a. The Committee then voted 4-1 to offer the position to Kincaid. The four male members voted for Kincaid, while Auddie Boone voted for petitioner Anderson.

Immediately after the Selection Committee concluded its work for that evening, Auddie Boone, according to her trial testimony, informed petitioner Anderson that she believed Anderson "was not selected because she was a woman." J.A. 120a. But Anderson herself testified that, apart from this post-interview conversation with Boone, she was never told by anyone on the Selection Committee that "he or she did not consider a female to be qualified for that position," nor had she heard from anyone else that any committeeperson had made such a statement.[1] J.A. 96a. Boone also told Anderson during this conversation that Boone's "own third choice for the position was Donnie Kincaid." J.A. 120a.

1. At the trial, Boone admitted she had "no evidence" that the other Committee members "wanted a man for that position." But, she said, "I still suspected it." J.A. 110a.

The underlying EEOC charge was filed by Anderson on March 31, 1975, claiming that "I was not hired for the position of Recreation Director for the City of Bessemer City because of my sex (female)." J.A. 63a. Nearly six years later, on February 19, 1981, the EEOC issued its Notice of Right to Sue. J.A. 64a. Anderson's complaint in the instant proceeding was duly filed on May 18, 1981. J.A. 2a. The case came on for trial on September 13, 1982—more than seven years after the critical events of the night of March 25, 1975. Not surprisingly, the memory of the witnesses to those events was often vague and uncertain, *i.e.*, Ms. Boone's statement: "I really don't remember [that conversation] with Mr. Butler. That's been too many years ago." J.A. 118a.

B. The Trial Proceedings

The testimony and exhibits introduced at the trial, upon which the District Court based its ultimate finding of intentional discrimination, can be summarized in terms of the three critical subsidiary findings of fact made by the court: (1) only the petitioner Anderson was seriously questioned by Committee members about whether she knew the position of Recreation Director involved working at night and travel to meet with other recreation directors and about her husband's reaction to her application for the job (see J.A. 12a-13a); (2) Anderson was better qualified than Kincaid to perform the duties required or a recreation Director (see J.A. 15a-19a); and (3) the male Selection Committee members were biased toward selecting a male for the position of Recreation Director, particularly someone versed in the traditionally male-dominated sports (see J.A. 20a-23a).

(1) *Questions concerning night work and spouses' reaction.* Petitioner Anderson testified that during her in-

terview someone on the Committee ("It's been seven years ago, sir. I do not remember [who asked me]." J.A. 95a) asked questions "such as did I realize there would be night work, was I aware of possibly traveling throughout the county and meeting with the other Directors, did I feel capable of doing that, and then the other question they asked me was how my husband felt about me applying for the job." J.A. 81a. But Anderson, not having been present while the male applicants were being interviewed, admitted she had no personal knowledge whether the males were "asked what their spouse's reaction would be to their taking the job if it were offered." J.A. 96a. Anderson also admitted that the only basis for her claim that no such question was asked of the male applicants was an inquiry she made of Ms. Boone, sometime after the selection had been announced. J.A. 96a.

Anderson's only corroborative witness on this point was Ms. Boone, the Selection Committee chairperson, who was of course present during all the interviews. Her testimony about the night work-spouse question included the following:

> Q. Did the committee members ask that same kind of question of the other applicants? A. Not that I recall. J.A. 108a.
>
> Q. You testified about the famous question about the family's reaction to the job. Who on the committee asked Ms. Anderson that question? A. I don't recall.
>
> Q. So, like Ms. Anderson, you know it was asked but you don't remember who asked it? A. It was either Tim Helms — Tim, I'm not going to put you on the spot. Let me say I don't recall. I'm not going to say because it would be just like picking a name out of a hat.
>
> Q. Do you deny that the other applicants, aside from the plaintiff, were asked about the prospect of

> working at night in that position? A. Not to my knowledge. J.A. 120a.
>
> Q. Are you saying they were not asked that? A. They were not asked, not in the context that they were asked of Phyllis [Anderson]. I don't know whether they were worried because Jim [Anderson] wasn't going to get his supper or what. You know, that goes both ways.
>
> Q. Did you tell Phyllis Anderson that Donnie Kincaid was not asked about night work? A. He wasn't asked about night work.
>
> Q. That answers one question. Now, let's answer the other one. Did you tell Phyllis Anderson that, that Donnie Kincaid was not asked about night work?
>
> A. Yes, after the interviews — I think the next day or sometime, and I know — may I answer something?
>
> Q. If it's a question that has been asked; otherwise, no. It up to the Judge to say. A. You asked if there was any question asked about — I think Donnie was just married, and I think I made the comment to him personally — and your new bride won't mind.
>
> Q. So, you asked him yourself about his own wife's reaction? A. No, no.
>
> Q. That is what you just said. J.A. 121a.

As the Fourth Circuit noted (Pet.App. 56a), the District Court's finding that Anderson was the only applicant seriously questioned about night work, travel and family reaction was based in substantial part upon the foregoing testimony by Boone. The District Court characterized Boone's remark to Kincaid that "your new bride won't mind" as facetious and asked merely out of annoyance or frustration. Pet.App. 12a. But the Fourth Circuit was not convinced by the District Court's subjective characterization of that particular remark, and held that "[t]he evidence in this case, even including Boone's testimony, amply demonstrates that a substantially similar question concerning

after-hours work and family reaction was posed both to Anderson and Kincaid, if not to all candidates." Pet.App. 58a.

Kincaid himself testified that, while he could not "pinpoint the question asked of him" seven years earlier during his interview, he did comment to the Committee that he understood the job of Recreation Director would involve "after hours work." J.A. 129a. Josiah Butler, one of the Committee members, was more precise in recalling that both Anderson and Kincaid had been asked about their respective spouse's reaction to night work. J.A. 145a. Butler also recalled who had asked Kincaid about his wife's reaction to his working late at night — "Yes. Ms. Boone made that reference." J.A. 146a. As to the precise wording of the question put to Kincaid, Butler testified that "I don't know whether it was a question or not, but it was an inference — how will your family feel about this, or how will your wife and children feel about this." J.A. 151a. And another Committee member, William McClellan, testified (J.A. 158a) that he was

> . . . pretty sure it was asked to everyone, about long hours, that this job would consist of long hours, being away from home at night. The best I can remember now, I'm stating that we did ask all the application [sic] — people that had their application in, people we interviewed that night.

(2) *The qualifications of Anderson and Kincaid.* While the Committee had before it no specific prehiring guidelines for selecting a Recreation Director, it was generally understood that the City desired someone who could reorganize the then-existing volunteer recreation program and who could develop, organize and manage a well-rounded program "to serve the needs of all age groups and both sexes. See J.A. 56a. It was also understood that the job would entail supervision of various physical sports activities, travel and consultation with other recreation directors, culminating in a need to work long hours — including night hours away from the home environment. The Committee thus sought someone with sufficient training and experience to implement those goals. And the Committee also quickly added the requirement that the Director reside in Bessemer City, in close proximity to other city officials and the recreation facilities.

Five of the original eight applicants, all males, were found to have insufficient training or experience to qualify. J.A. 145a, 166a. Of the three applicants deemed qualified — Broadway, Anderson and Kincaid — Broadway was the top choice of all members of the Committee, even Ms. Boone. While Broadway was deemed most qualified by virtue of his experience as a recreation director in the nearby town of Cramerton, as well as having attended college and taken five elective courses in physical education (J.A. 73a-74a), his refusal to relocate to Bessemer City eliminated him from consideration. J.A. 140a-141a.

The choice thus narrowed to Anderson and Kincaid. Which one was the more qualified? The four male members of the committee thought that Kincaid was the more qualified. Anderson was deemed the more qualified only by the Committee chairperson, Ms. Boone. The qualifications of these two individuals from the trial record are set forth in Appendix B herein beginning at 5a.

The District Court found "as a fact" that Anderson was "more qualified" than Kincaid for the job of Recreation Director "based on the totality of her educational, employment, and recreation experience." Pet.App. 15a. She was, said the court, "more qualified than Kincaid to perform the broad range of duties required of a recreation director" in that she had "direct experience teaching, supervising, directing programs, raising money, speaking

to the public, handling budgets, and planning activities, that Kincaid did not have." Pet.App. 19a. Moreover, Anderson was said to have "both participated in and taught a broad range of activities including sports, music, dance, and crafts." Pet.App. 19a. In sum, the "combination" of Anderson's "teaching degree, work experience, civic activities, and knowledge of recreation made her more qualified than Kincaid to perform the duties of the Recreation Director." Pet.App. 19a.

Kincaid was dismissed by the District Court as "having no experience supervising other employees, no experience in public speaking, and no experience in planning or directing the activities of a recreation department . . . no hands-on training or experience in creating and setting up a broad range of programs . . . no experience in teaching arts, crafts or music . . . never raised money or recruited personnel." Pet. App. 18a-19a. His only experience teaching sports was said to be "the required student teaching and coaching little league basketball in the winter of 1975." Pet.App. 19a. Since the court conceived that there "was no educational requirement for the job," Pet.App. 16a, the court ignored Kincaid's four-year college training in organizing physical education and recreational programs. And Kincaid's personal participation in most of the sports over which the Recreation Director would have supervision was cast aside as involvement in "the traditionally male dominated sports." Pet.App. 19a.

This finding that Kincaid was less qualified than Anderson was not shared by any Committee member other than Ms. Boone, the chairperson. The four male members preferred Kincaid, after Broadway was eliminated, because of his college training in supervising physical education programs, plus his own participation in some of the Bessemer City programs over which the Recreation Director would have supervision. Ms. Boone expressed her assessment of the comparative qualifications of the two candidates in trial testimony that indicated that her preference for Anderson was purely a personal one, and, indeed, in many respects she felt that Anderson was no better qualified than Kincaid. See Boone's following testimony:

> Q. Who was best qualified for the position of Recreation Director in your opinion? A. In my personal opinion, I felt Phyllis Anderson was the best qualified, and that's all-around qualified.
>
> Q. Would you explain what that was based on? A. Her past experience, her educational background. I knew about how she had worked with . . . her own children, for example, and backing that up with her professional experience. [J.A. 109a].
>
> • • •
>
> Q. Did you personally conclude that the plaintiff, Ms. Anderson, would be better qualified than Mr. Kincaid to institute a dance program? A. No. I think Mr. Kincaid would be fine.
>
> Q. You do not believe in that sense Ms. Anderson's qualifications were superior? A. No, indeed.
>
> Q. How about art, do you believe either one of them had qualifications superior to the other? A. That wasn't the basis of the hiring of a recreation — you asked me what I felt like would be . . .
>
> Q. What you were looking for in qualifications as a member of the committee . . . A. As an all around Director, I felt like Phyllis was the better applicant.
>
> Q. As to the subject of art, specifically? A. No.
>
> Q. As to the subject of dramatics? A. No, a rounded program, sir.
>
> Q. As to the subject of public speaking, specifically? A. No, sir.
>
> Q. As to the subject of team sports, specifically? A. No.

Q. Do you remember what questions, if any, you asked Mr. Kincaid about his training for the position either through experience or college courses? A. I don't remember really asking Mr. Kincaid anything specifically, because I think he's a fine young man, but I was under the impression, though, that he was not out of school at that time. [J.A. 117a-118a].

• • •

Q. At the time of those interviews . . . or as a result of those interviews, did you know what Mr. Kincaid's college curriculum consisted of? A. I know it was physical education.

Q. You knew that then [in 1975]? A. Yes, and I think he's a fine young man and he and his Assistant Director have been marvelous [after being employed in 1975 up to the time of trial]. [J.A. 118a].

• • •

Q. Did you indicate to Mr. Butler before the interviews—once again in your shop—that "it looks like it will be between Kincaid and Anderson"? Did you tell him that? A. I thought they were the best qualified. [J.A. 119a].

• • •

Q. Is it not true that you told Ms. Anderson that your own third choice for the position was Donnie Kincaid? A. My third choice?

Q. Yes. A. Yes. [J.A. 120a].

Having thus found on such a record that Anderson was the "more qualified candidate," the District Court set the stage for its ultimate finding that "the more qualified candidate" was not selected—as Ms. Boone always "suspected" but had "no evidence" (J.A. 110a)—simply "because of her sex." Pet. App. 20a.

(3) *The bias of the Selection Committee male members.* The final critical element of the District Court's findings concerns the determination that the male members of the Selection Committee were biased toward selecting a male for the position of Recreation Director, particularly someone versed in the traditionally male-dominated sports. Pet.App. 20a. That bias, said the court, was based not on facts but on inferences from the evidence, to wit:

(a) Only the female candidate, Anderson, was asked questions about night work and the reaction of her spouse. Such questions were not "seriously" asked of any male candidate. See point (1) discussed above.

(b) One of the male Committee members, Josiah Butler, had solicited applications from four males for the job (including Kincaid and Broadway). Although he knew two qualified women, he did not seek applications from either of them—on the assumption that the women would not want to take a cut in pay to accept the job, an assumption he did not make with respect to the males. Pet.App. 21a.

(c) Another male member, Eugene Nichols, testified that "it would have been real hard" for a lady to have run the job.[2] The court also pointed to another statement of Nichols that he thought "my wife should be home at night."[3] Pet.App. 21a.

---

2. The Nichols statement to which the court refers reads *in full* as follows: "At the time that we were talking about getting this recreation program started at Bessemer City, a lady could have run the job. I'm not saying she couldn't, but it would have been real hard." J.A. 158a. Nichols, in further explanation of that statement, testified that at the time of Anderson's interview he would have been willing to put a lady in that position and "I knew some ladies that I would have." J.A. 161a.

3. The full statement of Nichols to which the court refers reads: "Q. You wouldn't want your wife to have that job,

(Continued on the next page)

(d) The court stated that the emphasis by the male committee members on "the importance of a degree in health and physical education was abandoned when they first explained why Broadway was their first choice," inasmuch as Broadway "had no degree" and yet "they found him most qualified because of his work experience."[4] Yet, said the court, the male members "downplayed the significance of experience when comparing plaintiff's [Anderson's] teaching, supervisory, and recreation experience to Kincaid's qualifications." Pet.App. 22a.

(e) Two of the male members, Nichols and Butler, emphasized the role of the Recreation Director in organizing traditionally male-dominated sports leagues." Nich-

---

(Continued from the previous page)

though, would you? A. No, sir, I wouldn't. Q. And you wouldn't want to put a lady through lining ballfields and being at the gym at night? A. I'm speaking personally for myself. I have three children at home, and I think my wife should be at home at night." J.A. 161a.

4. The court's reference in this respect is to a question asked of one committee member, William McClellan, that reads in context as follows:

> Q. Under the section on the [Broadway] resume entitled Education, does it not say [he] attended Appalachian State University and Gaston College, took five electives in Physical Education? A. Which one?
>
> Q. Under Education right here. A. Yes, it does.
>
> Q. And you have examined this resume and you don't see anywhere on there that says he had a degree in Physical Education or Recreation? A. No, sir.
>
> * * * *
>
> Q. What, if anything, did you personally know about Bert Broadway's qualifications for the position? A. His experience in recreation, I believe it was, with the Cramerton Recreation Department.
>
> Q. If you know, what was that experience? A. I don't know. I don't remember. I just know he was in recreation. [J.A. 155a].

ols referring to the job as that of "Athletic Director"[5] and Butler having "wanted the baseball, football, and basketball programs to be strengthened."[6] Pet.App. 22a. The court drew "male-dominated sports" significance from Nichols' response to a question as to his experience in running the city recreation program the preceding four years, under the auspices of the Optimist Club. Nichols testified that he had looked after the baseball, football and basketball facilities, lined the fields, and helped out by officiating at basketball games, etc. J.A. 156a. From such testimony by Butler and Nichols, the court observed that neither had mentioned "the broad range of recreational activities outside these [male-dominated] sports that a director would be expected to organize and supervise." Pet.App. 22a.

(f) Although one Committee member, Helms, testified that Kincaid was his second choice (after Broadway)

---

5. Nichols was asked, during a deposition, how he would describe "how you went about distinguishing or ranking one candidate above another candidate to fill the job." To which Nichols replied: "By listening to them. In my mind, I had what I thought a good Athletic Director for the City would be." At the trial, Nichols merely acknowledged that he had referred in the deposition to the Recreation Director as an Athletic Director. J.A. 160a. An additional question about whether Nichols thereby intended to emphasize "traditional male sports" was withdrawn before it could be answered.

6. Butler's statement appears in the following colloquy:

> Q. From your experience and the kinds of things you were interested in or had been interested throughout your life, you wanted the baseball, football and basketball programs to be continued and to be strengthened? A. Yes, I wanted them strengthened. I wanted the Recreation Department to help with some of the planning, not in actual running the program, though. I felt that we [the local Optimist Club] were running the program but I wanted help in financing, facilities and planning. As I said, we were still running the programs, as far as the actual operation of these programs, except the basketball. [J.A. 149a-150a].

because Kincaid had "made a very good presentation . . . [and] put forth a very good program,"[7] and although another member, McClellan, testified that Anderson and Kincaid had presented similar programs in their interviews,[8] the court found "that there was no substantial difference between the programs offered during the interview and that this explanation [by Helms and McClellan] is pretextual." Pet.App. 23a.

From these various inferences, the District Court concluded (1) that the "male members of the committee, chose Kincaid, the less qualified candidate, because he was male," (2) the "explanation offered that Kincaid was more qualified because of his degree in health and physical education is pretextual," and (3) "But for the discrimination based on sex, the plaintiff would have been selected for the position of Recreation Director of Bessemer City." Pet.App. 23a.

Attached to the District Court's findings of fact were the court's conclusions of law. Those conclusions stated, *inter alia*, that:

(1) Anderson's evidence "satisfies her burden of showing that she applied for the position, was qualified, but 'was rejected under circumstances that give rise to an

---

7. Helms testified that "Mr. Kincaid made a very good presentation, if I remember correctly, that he was very enthusiastic. He put forth a very good program that he would develop with the recreation program in Bessemer City, a cradle-to-the-grave type program to include everyone in the community, a very, very, very varied type program that would include dance, the traditional recreation type sports. It would include just anything that the people in Bessemer City would like to do that there were enough people interested in doing—square dancing to clogging to ballet to bridge to just the entire gambit of what a recreation program should be about, a very good presentation." J.A. 164a.

8. McClellan testified that the programs Anderson had in mind "were pretty well the same as Mr. Kincaid's." J.A. 153a.

inference of unlawful discrimination.' . . . Those circumstances include the gender stereotyped questions asked only of the plaintiff and the failure to solicit qualified men and women equally to apply for this position." Pet. App. 25a.

(2) The City articulated a "nondiscriminatory reason for failing to select plaintiff: that another candidate was better qualified because of his educational degree. . . . The court concludes that the defendant's explanation is pretextual for the reasons set forth fully in the findings of fact. Plaintiff was more qualified than Kincaid to perform the broad range of duties required of a Recreation Director. The male members of the committee were biased toward selecting a male for the position as inferred from the questions about night work and reaction of her spouse asked only of the plaintiff, the failure to solicit qualified women to apply for the position, the perception that a woman would have more difficulty in the position, and the emphasis on traditionally male-dominated sports to the exclusion of recreational activities for all ages and both sexes. The male members of the committee emphasized either experience or education, depending on which criteria justified the choice of a particular male candidate." Pet.App. 26a-27a.

(3) Close scrutiny is required, said the court, where a hiring decision is made on subjective, unarticulated criteria. Pet.App. 27a. And here the male members' gender biases played "a substantive and decisive role in the hiring decision." *Id.* Their decision not to hire "the more qualified applicant for Recreation Director is based on such stereotyped impressions of the sexes as indicated in the questions asked the plaintiff during the interview and the testimony of the male committee members at trial." Pet.App. 29a-30.

It should be noted that at only one point in its findings of fact did the District Court state that it was relying in any part on "the credibility of the different witnesses." See Pet.App. 13a. That reference was made with reference to its conclusion of fact "that no serious question about night work or reaction of spouses was asked of any candidate besides the plaintiff." *Id.* As to no other fact finding did the court purport to rely on the credibility of witnesses. Moreover, even this one reference to credibility was missing from the District Court's original Memorandum of Decision. Pet.App. 1a-5a. Reliance on credibility was inserted into the Findings of Fact only at the insistent suggestion of the petitioner's counsel, subsequent to the filing of the Memorandum of Decision.

Indeed, many of the detailed findings of the court were taken from Anderson's proposed findings and conclusions. As the Fourth Circuit remarked, "Although in this case the district court did not adopt verbatim Anderson's proposed findings and conclusions, it did adopt the substance of her submission, with certain rewording and additions." Pet.App. 64a.

C. The appellate proceedings

The Fourth Circuit reversed the District Court's judgment in favor of Anderson on the ground that the critical findings of fact by Judge McMillan were "clearly erroneous" within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure. The Fourth Circuit emphasized that close scrutiny of the record in this respect was justified by the manner in which the Findings of Fact and Conclusions of Law had been prepared, *i.e.*, by adopting most of the findings and conclusions proposed by the prevailing party, the petitioner Anderson. With respect to the "clearly erroneous" findings, the Fourth Circuit ruled as follows:

(1) On the legal assumption that Anderson's burden was to establish that she was better qualified than Kincaid, the Fourth Circuit held that the record "simply fails to support the district court's finding that between the two candidates, Anderson had the superior qualifications." Pet. App. 50a. Although there were no prehiring guidelines for the Committee, it was clear "that athletics was a significant and legitimate concern of all the committee members, both male and female." *Id.* And on that score, "Kincaid's overall training was superior to Anderson's training and experience for the demands of this job." Pet.App. 54a. Moreover, "even among equally qualified candidates"—and Anderson was concededly qualified—the Fourth Circuit concluded that an employer "has discretion to choose the person he prefers." Pet.App. 54a-55a.

Thus, because the Fourth Circuit's review of the entire evidence left it "with the definite and firm conviction that a mistake had been committed," *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948), the Fourth Circuit concluded that the "finding that Anderson was better qualified than Kincaid is clearly erroneous," citing Rule 52(a). Pet.App. 56a.

(2) Again citing Rule 52(a), the Fourth Circuit found "clearly erroneous" the District Court's finding "that Anderson was the only applicant seriously questioned about night work, travel, and her family's reaction to these job requirements." Pet.App. 56a-59a. The trial court's finding in that respect was said to be based in substantial part on Boone's testimony, whereas the entire record—including Boone's testimony—amply demonstrates "that a substantially similar question concerning after-hours work and family reaction was posed both to Ander-

son and Kincaid, if not to all candidates." Pet.App. 58a.[9] Moreover, in the Fourth Circuit's reading, the entire record "clearly demonstrates that night work and travel were anticipated functions of the position . . . [and thus] any question on these subjects was certainly job-related." Pet. App. 59a.

Thus the District Court's finding that Anderson was the only candidate seriously questioned about these matters "represents another instance in which the trial court impermissibly interjected its own judgment into the case. The finding is without evidence to support it and is, therefore, clearly erroneous." Pet.App. 59a.

(3) Finally, the Fourth Circuit addressed the District Court's conclusion that the male Committee members were biased in favor of hiring a male and not to select the more qualified female applicant. In the District Court's mind, that conclusion was derived from the stereotyped impressions of the sexes as reflected by the questions asked of Anderson during her interview and by the trial testimony of the male Committee members.

The Fourth Circuit ruled that since it had already determined that the findings with respect to points (1) and (2) above were clearly erroneous, without those critical findings the remaining evidence relied upon by the District Court on this point (3) "is simply insufficient to support the district court's conclusion that the male committee members were biased." Pet.App. 60a-61a. At this juncture of the Fourth Circuit's opinion, the court dropped footnote 5 (Pet.App. 61a). Footnote 5 details some of the evidence found insufficient to support this bias finding, including the testimony of the four male Committee members that their wives had worked and were accustomed to being away from home during evening hours. It is from that footnote reference to such testimony that the petitioner has sought to construct the third Question Presented to this Court—whether the Fourth Circuit erred "in holding that a prima facie case of employment discrimination on the basis of sex may be rebutted by proof that the responsible personnel officials permitted their wives to work." Suffice it to say at this point that the Fourth Circuit made no such holding in footnote 5.

The Fourth Circuit concluded its discussion of point (3) by ruling "that our review of the entire record leads us to conclude that Anderson failed to carry her burden of demonstrating sex-based bias on the part of the male committee members . . . [and that], given this record, she failed to fulfill her overall burden of proving intentional discrimination because of her sex." Pet.App. 62a.

SUMMARY OF ARGUMENT

This case originated in little more than "a woman's intuition," or suspicions on the part of the chairperson Auddie Boone, that (1) Kincaid, the male applicant for the position of Recreation Director of Bessemer City, had the job sewed up from the start, because of his family connections in the community, and (2) the four male members of the Selection Committee were biased against selecting a woman for the position, although Boone had "no evidence" of either suspicion. But from those early suspicions has come a judicial determination that the four

9. The Fourth Circuit was not "convinced" by the District Court's characterization of Boone's remark to Kincaid, "and your new bride won't mind," as facetious and asked merely out of annoyance or frustration. Pet.App. 58a. The Fourth Circuit noted that the record does not indicate the sequence of the 1975 interviews and thus fails to provide the requisite support for this theory, "which presumes that the six unsuccessful male candidates were interviewed first, followed by Anderson, and then Kincaid." Pet.App. 59a. In any event, night work and travel are uncontroverted functions of the positions, and questions on those subjects were thus job-related.

male Committee members were so consumed with "gender stereotypes or sexual bias" that they adamantly refused to select the sole woman applicant for the position, the petitioner Anderson. Thus, the trial court concluded, the petitioner was "discriminated against because of her sex in violation of Title VII."

The case before this Court revolves around the scope of the authority of an appellate court, under Rule 52(a) of the Federal Rules of Civil Procedure, to review and reverse a district court's findings of fact that are found to be "clearly erroneous". But there are several qualifications with respect to this case to be made at the outset:

1) The third question presented in petitioner's brief, pertaining to the so-called "working wife defense," is simply not involved in this case. No such defense was ever offered by the City, no such defense was ever put into issue on the appeal to the Fourth Circuit, and no such defense was ever considered or approved by the Fourth Circuit. Petitioner's objections to the defense, raised for the first time in these *certiorari* proceedings, stem from a misreading of footnote 5 of the Fourth Circuit's opinion.

2) The second question presented by petitioner, as to whether Rule 52(a) forbids courts of appeal from reviewing credibility findings, was also not addressed or resolved by the Fourth Circuit. While certain general credibility findings were involved in the appellate review, at no point was the power and authority of the Fourth Circuit to review such findings put into focus.

3) Additionally, there is one matter decided by the Fourth Circuit that the petitioner does not see fit to bring before this Court. The Fourth Circuit held that the findings under review were flawed in that their substance—including all references to credibility matters—was taken

from the findings proposed by the prevailing party, the petitioner herein. That factor was held to justify further the Fourth Circuit's "close scrutiny of the record."

The only legal issue as to an appellate court's authority under Rule 52(a) is raised by the *amici* United States and Equal Employment Opportunity Commission. The claim is that Rule 52(a) gives the reviewing court no authority to make independent or de novo findings of fact. That claim need not be resolved, however, for the Fourth Circuit made no such findings. It simply performed its duty under Rule 52(a) to review "the entire evidence" to determine if "a mistake has been committed" by the district court by way of making "clearly erroneous" findings. Whatever contrary findings appear in the opinion below were drawn from the entire evidence to demonstrate the erroneousness of the district court's findings. *cf. Pullman-Standard v. Swint*, 456 U.S. 273 (1982).

Petitioner's major effort is devoted to the claim that the Fourth Circuit "exceed(ed) its authority under Rule 52" in holding that there was insufficient evidence to support the trial court's findings of hiring discrimination on the basis of sex. On that uniquely factual proposition, the entire record demonstrates the correctness of the Fourth Circuit's decision. And there can be no question that the Fourth Circuit acted within "its authority in holding that there was insufficient evidence to support the trial court's findings.

ARGUMENT

I. Rule 52(a) authorizes appellate courts to review the entire record to determine if a trial court's findings of fact are "clearly erroneous."

Rule 52(a) provides that "[f]indings of fact shall not be set aside [on appeal] unless clearly erroneous, and due

regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." In this case, the Fourth Circuit has been totally faithful to its duties and powers under Rule 52(a).

Petitioner argues that the District Court's findings in this case are not clearly erroneous and thus "should be sustained" by reason of the provisions of Rule 52(a). Pet.Brief, 57. The United States, on the other hand, contends that, under the "clearly erroneous" standard, "an appellate court should not weigh the evidence de novo and supplant the district court's determinations with its own." U.S.Brief, 7. Neither argument fully portrays the meaning or scope of Rule 52(a).

In 1948, this Court made the seminal definition of "clearly erroneous" findings. In *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948), the Court articulated the definition in these terms:

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

That definition has been reiterated and quoted numerous times by this Court. E.g., *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969); *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74 n. 19 (1978); *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 855 (1982); *Bose Corp. v. Consumers Union of United States*, 104 S.Ct. 1949, 1959 (April 30, 1984). Moreover, as the *Gypsum* case made clear, this definition of "clearly erroneous" also applies where the trial court's findings consist of "inferences drawn from documents or undisputed facts." 333 U.S. at 394.

It is also clear that Rule 52(a) imposes on an appellate court some higher duty than rubber stamping a trial court's

fact findings. The reviewing court must look at the entire evidence and it "must determine whether the trial court's findings are clearly erroneous, sustain them if they are not, but set them aside if they are." *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 534, n. 8 (1979). Thus, the appellate court's "unavoidable duty" *(id.)* under Rule 52(a); is that it "must set aside the trial court's findings if it concludes that they are 'clearly erroneous,'" *Kelly v. Southern Pacific Co.*, 419 U.S. 318, 323 (1974). As stated most recently in the *Bose* case, *supra*, 104 S.Ct. at 1959, Rule 52(a) "never forbids such an examination [of the entire record] and indeed our seminal decision on the rule [*Gypsum*] expressly contemplated a review of the entire record, stating that 'a finding is "clearly erroneous" when although there is evidence to support it, the reviewing court *on the entire evidence* is left with the definite, firm conviction that a mistake has been committed.'" [Emphasis in original].

Professors Wright and Miller have made the point even more specific:

> This respect for the findings by the trial court cannot be pressed too far. It is simply wrong to say, as one court has, that the "findings will be given the force and effect of a jury verdict." History is clear that the draftsmen of the rule rejected proposals to apply the limited review of a jury verdict to findings of a judge. Thus it is not accurate to say that the appellate court takes that view of the evidence that is most favorable to the appellee, that it assumes that all conflicts in the evidence were resolved in his favor, and that he must be given the benefit of all favorable inferences. . . . [T]he appellate court may examine all of the evidence in the record. It will presume that the trial court relied only on evidence properly admissible . . . It must give great weight to the findings made and the inferences drawn by the trial judge, but it must reject his findings if it considers them to be clearly erroneous.
>
> • • •

> If a finding is not supported by substantial evidence, it will be found to be clearly erroneous. Some cases state a converse proposition that a finding that is supported by substantial evidence cannot be clearly erroneous. That is not the law. If the findings are against the clear weight of the evidence or the appellate court otherwise reaches a definite and firm conviction that a mistake has been made, the appellate court will set the findings aside even though there is evidence supporting them that, by itself, would be substantial.

C. Wright and A. Miller, *Federal Practice and Procedure*, Vol. 9, pp. 729-731, 735 (1971).

In this case, the Fourth Circuit did perform its "unavoidable duty" of searching the entire record to determine if the District Court's findings of fact were unsupported by substantial evidence and thus were "clearly erroneous." Though the critical fact question underlying the District Court's findings was whether the Selection Committee acted with discriminatory intent when it selected a male rather than a female applicant, the Fourth Circuit was in no way relieved of that duty. A trial court's "finding on discriminatory intent . . . is clearly erroneous under Rule 52(a)," *Pullman-Standard v. Swint*, 456 U.S. 273, 290 (1982), when the evidence as a whole reveals the contrary.

From its review of the entire record, the Fourth Circuit made two critical determinations: (1) that "Kincaid's overall training was superior to Anderson's training and experience for the demands of this job," Pet.App. 54a; and (2) that "a substantially similar question concerning after-hours work and family reaction was posed both to Anderson and Kincaid, if not to all candidates," Pet.App. 58a. But those determinations did not surface from any de novo "weigh(ing) of the evidence" as the United States would have it. They were perceived upon the re-

view of the entire record that Rule 52(a) mandates. They were developed not as de novo or independent appellate findings but as demonstrations from the entire record as to how "clearly erroneous" were the District Court's findings on those matters. It is elementary that if the entire record shows not only that a finding is not supported by substantial evidence but that the record actually supports quite the opposite finding, the trial court's finding must be deemed "clearly erroneous."

This Court's decision in *Pullman-Standard v. Swint*, *supra*, is sharply distinguishable on this very point. The Court there condemned de novo fact findings by an appellate court, on issues of discriminatory intent, in a situation where the appellate court "had not expressly referred to or applied Rule 52(a) in the course of disagreeing with the District Court's resolution of the factual issues." 456 U.S. at 290. Similarly, in *Inwood Laboratories v. Ives Laboratories*, *supra*, the appellate court erred in making independent findings of fact, differing from those of the trial court, without reference to whether the trial court's findings were "clearly erroneous" under Rule 52(a).[10] 456 U.S. at 855-858.

In the instant case, on the other hand, the Fourth Circuit suggested these findings only in the context of demonstrating how the entire record revealed the "clearly erroneous" nature of the trial court's findings. As Justice Rehnquist said in his *Inwood* concurrence, this Court's seminal *Gypsum* decision "establishes the authority of a reviewing court to make its own findings, contrary to those of the trial court, where it has determined the latter to be 'clearly

---

10. Justice Rehnquist's concurring opinion in *Inwood* assumed that the Court's "discussion of appellate review of trial court findings in bench trial, *ante*, at 855, is limited to cases in which the appellate court has not found the trial court findings to be 'clearly erroneous.' " 456 U.S. at 864.

erroneous.'" 456 U.S. at 864. The very fact that the entire record was capable of producing the findings made by the Fourth Circuit obviously left the court "with the definite and firm conviction that a mistake has been committed." *Gypsum,* 333 U.S. at 395.

In sum, the Fourth Circuit properly used findings springing from its review of the entire record to demonstrate the "clearly erroneous" nature of the findings submitted by the petitioner and adopted by the District Court.[11]

II. The Fourth Circuit followed Rule 52(a) standards in examining the entire record and in holding that the District Court's findings of fact were unsupported by the record and thus were "clearly erroneous."

The first Question Presented in Petitioner's brief is whether the Fourth Circuit exceeded "its authority" under Rule 52 in holding that there was insufficient evidence to support the District Court's finding of sex discrimination in hiring. If that question is meant to challenge the power or authority of the Fourth Circuit to hold a particular finding "clearly erroneous," the question is both frivilous and raised here for the first time.

Presumably, this is just a badly framed question and what petitioner really means to challenge is the correct-

---

11. For another formulation of the phenomenon of appellate fact-finding as an incidental means of determining if the trial court's findings are "clearly erroneous," see *Miller v. Mercy Hospital, Inc.,* 720 F.2d 356, 361, n. 5 (4th Cir. 1983), cert. pending, No. 83-1629. Judge Phillips there wrote:

"... it is of course inevitable that a reviewing court's conviction of mistake may sometimes include a conviction that the actual facts are other than those 'found.' ... Though occasionally they must exist, such convictions about the 'truth' or 'right' of a case are merely incidental to, not necessarily predicates for, a reviewing court's conclusion that a finding is clearly erroneous. It is enough that the finding is 'against the great preponderance of the evidence' in the record presented for review."

ness of the Fourth Circuit's determination that the record evidence is insufficient to support this critical factual conclusion. On that score, Petitioner's arguments are without merit.

As we have seen in Part I of this Argument, Rule 52(a) clearly authorizes an appellate court to examine the entire record to see if "a mistake has been committed" in the fact finding process. And a trial court's finding constitutes a "mistake" although "there is evidence to support it" if the appellate court is convinced from the entire evidence that the finding is "clearly erroneous." *United States v. United States Gypsum,* 333 U.S. 364, 395 (1948). That means that a finding may be erroneous because it is induced by an erroneous view of controlling legal standards; or because it is not supported by substantial evidence; or because it was made without properly taking into account substantial evidence to the contrary; or because it is against the clear weight of the evidence considered as a whole. See *Miller v. Mercy Hospial, Inc.,* 720 Fed. 2d 356, 361 (4th Cir., 1983); C. Wright and A. Miller, *Federal Practice and Procedure,* Vol. 9, pp. 734-735 (1971).

In this case the Fourth Circuit made the following determinations from its careful review of the entire record. The facts supporting the Fourth Circuit's determination are detailed in the Statement of the Case in this brief, *supra.*

A. Questioning of applicants about willingness to work at night:

Boone testified that she herself asked Kincaid, the successful applicant, about his own family's amenability to his working at night. (J.A. 121a). Selection committee member Nichols testified that the night work inquiry was asked of all applicants. (J.A. 158a). As the Fourth Cir-

cuit stated in its opinion, the trial court's characterization of Boone's query to Kincaid about night work as "facetious" and "asked out of frustration" had no support, in the record, since for Boone to have been thus "frustrated" by petitioner being asked and males not, the sequence of interviews would have had to have been first, petitioner, next, all unsuccessful male applicants, and finally, Kincaid, a sequence which was not on the record and which as a matter of simple statistical probability almost certainly did not occur.

B. Relative Qualifications of Anderson and Kincaid.

On this point, the Fourth Circuit concluded that the record "simply fails to support the district court's finding that between the two candidates, Anderson had the superior qualifications." Pet.App. 50a. The Court also found "simply nothing in the record" to support the claim that the selection committee had manipulated the job requirements to favor Kincaid over Anderson, particularly since the record was "clear" that the committee perceived knowledge of athletics and sports to be important parts of the Recreation Director's job. Pet.App. 50a-51a.

The Fourth Circuit also determined that the District Court's finding that Anderson should have been selected because of her superior qualifications was induced by an erroneous view of controlling law. As this Court has declared, Title VII does not expose an employer to liability simply because a court may think that the employer misjudged the qualifications of the applicants or because the employer failed to restructure its employment practices to maximize the number of women or minorities hired. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Const. Co. v. Waters*, 438 U.S. 567 (1978).

In finding that petitioner had qualifications for the Recreation Director's position superior to those of Kincaid, the district court, as the Fourth Circuit noted, gave short shrift to Kincaid's directly job-related degree, earned one year before, to his participation as team member and coach in the very programs he would supervise, to his testimony about the job-related content of his college curriculum, and to his formal training in supervising children and the handicapped.

By contrast, and as the Circuit also specifically held, petitioner's only directly recreation-related experience was a period of one year, some eighteen years before her job application with Bessemer City, in a job the title of which she could not even remember (if it had a title). Moreover, she was credited for having a state recreator's certificate, after her own testimony that she did not know what, if anything, was required to get the certificate, that she had received it some eighteen years before, and that she did not even know if it was still active when she applied with respondent. See Appendix B herein beginning 5a.

C. Selective recruiting by Selection Committee:

Petitioner and her *amici* also point to recruitment of male applicants by male Selection Committee members as evidence of sex-based bias by them. What they do not state includes:

a. Committee members articulated non-discriminatory reasons why they recruited certain males but not females;

b. Boone herself recruited petitioner, but no males, to apply for the position;

c. Perhaps most significantly, selective recruiting was not mentioned in the trial court's Memorandum of De-

cision as a basis for the court's finding of unlawful bias. Instead, it was created by petitioner's counsel in writing the full opinion for the Court, as more fully discussed in Point V of this Argument, *infra*.

The petitioner dwells at length on the allegedly subjective criteria utilized in selecting Kincaid over petitioner. But, as the Fourth Circuit points out, the criteria employed in making the selection were all job-related and were applied equally to all applicants. Each Committee member *knew*, from personal experience with the City's recreation program, what job criteria were applicable. The City's mayor appointed these five persons to make the employment decision because they were personally familiar with the requirements of the job through their respective civic and community recreation activities. Who better than they knew what the job required? A small town of 5,000 citizens cannot be expected to hire an industrial recruiter and psychologist to conduct a scholarly validity study on every job opening which arises, at risk of being condemned for bias if someone becomes unhappy with the selection made. Title VII intends no such result, as the Fourth Circuit, and this Court, recognize. *Texas Dept. of Community Affairs v. Burdine* and *Furnco, supra*.

• • •

Petitioner also dwells at length on the alleged admission that Selection Committee member Nichols supposedly made about his unwillingness to hire a female for the recreator's job. In fact, Nichols said only that he would not want his own wife in the position, a wholly different matter. Moreover, Nichols was but one of the Committee members, all of whom, including Nichols, agreed who the best candidate was. See Statement of Facts hereinabove.

In addition, Nichols' allegedly discriminatory admission was absent from the District Court's Memorandum of

Decision announcing the court's finding of discrimination. Only when the petitioner's counsel essentially wrote the final opinion of the court did this aspect of the case appear as a rationale.

Petitioner and her *amici*, in their briefs on the merits, emphasize that Bessemer City's recreation program, before Kincaid was hired as a paid employee, was run primarily by volunteers from the local Optimist Club. As with several other apologia for the District Court's opinion below, the Optimist Club rationale did not appear in the District Court's initial Memorandum of Decision, even though petitioner's counsel argued at trial that the Club's involvement in the City's recreation program implicated unlawful bias. Thus, the district court specifically rejected the Optimist Club matter in its final opinion from which appeal was taken, which is why the Fourth Circuit did not address this matter in its opinion.

The Optimist Club argument, at any rate, is conceptually indefensible. Contrary to petitioner's characterization, the successful job candidate, Donald Kincaid, was *not* a member of the club, and nothing in the record is susceptible of an interpretation that he was. Instead, he participated as a volunteer coach (and in his secondary school days, as an athlete) in the City's recreation programs which were conducted by the club. The petitioner Anderson was free also to participate as a volunteer in the Optimist-run program. In fact, she did so, in the sense that she watched her own children play competitive sports in the City's recreation programs. (Such spectating was advanced by her counsel as an element of her recreation-related "experience" and "qualifications").

Petitioner contends that such participation in the City's recreation programs by Kincaid, in the very activi-

ties and in the very facilities he later would supervise, somehow sullies his job-related qualifications established thereby, especially since one or more selection committee members knew of his involvement through their own respective voluntary help with the City's recreation programs conducted by the club before Kincaid was hired as "in-house" recreation director. As discussed above, this argument cannot provide a rationale for defending the District Court's decision, since it was not part of the decision and specifically was rejected by the district court after being presented to the court at trial by Anderson's counsel. Moreover, if this sort of argument properly could be raised in this Court, it simply will not bear the light of simple analysis. If it could, participation by females in all-female activities, such as the current (and laudable) "networking" programs of such female-advocacy organizations as the National Organization for Women (one of the *amici* in this very case) similarly would be sullied by such sex-based exclusivity.

On a more specific level, petitioner and her National Organization for Women *amicus* now argue to this Court, in reference to petitioner's alleged job qualifications, that *her own* activities with the Jaycettes and Exchangettes Clubs prepared *her* to run Bessemer City's recreation program, e.g. *Amici* brief, pp. 7-9:

> "She was also active in local civic organizations, the Exchangette Club and the Jaycette Club . . . none of the male committee members apparently credited Ms. Anderson's club activities or personal childraising experiences as having any relevance to the job even though she testified that she had shephered two boys through numerous sporting activities (in Bessemer City's recreation program, then run by the Optimist Club).

These two clubs, of course, are as sex-segregated now as the Optimist Club once was, but to the exclusion of males

rather than females. If Kincaid's voluntary civic activities are thus sullied, petitioner is painted with the same brush.

The ACLU, et al., *amici* urge the Court to modify the authority on the allocation of proof in Title VII cases, e.g. *Burdine, Furnco, supra,* by contending that an employer should not have the opportunity to articulate legitimate reasons for the employment decision at issue, when there is direct evidence of intentional discrimination. *Amici* brief of American Civil Liberties Union, *et. al.*, pp. 16-45.

Aikens v. Postal Service, 453 U.S. 902 (1981) and *Burdine, supra,* make it abundantly clear that the employer has the opportunity to articulate the legitimate, non-discriminatory reasons which underlay challenged employment decisions, and that such articulation dispels the inference of discrimination established by plaintiff's *prima facie* case. Although this Court's rulings as to proof in Title VII cases also demonstrate that a formalized, mechanical approach to proof is not to be employed, e.g., *Aikens, Furnco,* it is also clear that the employer does not at any time carry the burden of proving anything, especially the absence of discrimination, *Sweeney v. Board of Trustees,* 439 U.S. 24 (1978) and that under no circumstance can the employer be denied the opportunity to present its defense, as the ACLU. et. al. would urge this Court. To accept their position would be tantamount to requiring challenged employers to bear the burden of proving the unproveable, i.e., the absence of discrimination, a proposition which has been rejected four-square by this Court. *Burdine, Sweeney, supra.*

III. To the extent that findings of fact depend upon credibility determinations, an appellate court is not relieved of its Rule 52(a) duty to determine if such findings are "clearly erroneous."

Petitioner's second Question Presented is whether Rule 52(a) forbids the courts of appeals from reviewing

"the credibility findings of a trial judge."[12] In her brief, petitioner contends (p. 57) that certain of the District Court's findings in this case are "express demeanor-based credibility determinations," and that such determinations "are not subject to appellate review at all."

In light of the record in this case, however, there is serious doubt that petitioner's question is properly before this Court. The Fourth Circuit's opinion does not address or resolve its power under Rule 52(a) to review credibility-based or demeanor-based findings on a "clearly erroneous" standard. Nor does it appear that either party—particularly the petitioner—presented any such issue to the Fourth Circuit.[13]

In the trial transcript, the only mention of the credibility issue is a brief reference by the City's counsel, during the course of his summation to the trial judge, to the effect that whether a question about spousal reaction

12. Significantly, the *amici* brief of the United States does not see the credibility matter as a question presented in this case. Nor does the ACLU *amici* brief argue the point.

13. As the appellee in the Fourth Circuit, petitioner Anderson presented the following four issues to the Fourth Circuit (brief, p. 1):

1. Whether the findings of fact upon which the District Court based its decision that the plaintiff was a victim of discrimination are clearly erroneous.
2. Whether the District Court was clearly erroneous in concluding that the male members of the selection committee were biased in favor of selecting a male.
3. Given the facts found and reasonable inferences drawn therefrom, whether the District Court was clearly erroneous in concluding that plaintiff was denied the job of Recreation Direction because of her sex.
4. Whether the opinion of the District Court should be subjected to unusual scrutiny because of the assistance the District Court requested and received from the parties before the Court prepared its own Findings of Fact, Conclusions of Law, and Judgment.

was put both to Kincaid and Anderson is "certainly a matter for resolution of credibility on your part." J.A. 176a.

The credibility matter next surfaces in the District Court's Findings of Fact and Conclusions of Law. In the opening paragraph of that document appears a general statement that the court's earlier finding of sex-based discrimination in the Memorandum of Decision (Pet.App. 1a)—which failed to mention any credibility determinations—was belatedly "supported" by "a review of the key evidence and a resolution of the central issues of credibility." Pet.App. 7a. But those "central issues" were not otherwise identified.[14] In the court's Finding No. 9, however, dealing with the question asked of the applicants about night work and spousal reaction, the following statement appears (Pet.App. 13a):

> After hearing live testimony and considering the *credibility of the different witnesses*, this court concludes as a fact that *no serious question* about night work or reaction of spouses was asked of any candidate besides the plaintiff. [Emphasis added].

Presumably, this statement in Finding No. 9 is the basis of petitioner's tardy attempt before this Court to raise a broad credibility review question. But even that attempt must be faulted, apart from its lateness, on the ground that the credibility determination in Finding No. 9 goes not to whether only the petitioner Anderson was asked this question but to whether Boone was "serious" when she asked the question of Kincaid. The Fourth Cir-

14. This general reference to "central issues of credibility" had its genesis in the preliminary paragraph of petitioner's proposed findings of fact and conclusions of law. That paragraph proposes that the court premise all its findings with the recitation that the court had "considered all of the evidence [and] made credibility determinations where necessary." J.A. 11a.

cuit did not reverse that "seriousness" finding; it merely said it was not "convinced" by the District Court's subjective characterization of the facetiousness of the question.[15] Pet.App. 58a-59a. Looking to the entire record, the Fourth Circuit discovered evidence that "amply demonstrates" that "a substantially similar question" was asked of both Anderson and Kincaid, if not of all candidates. Pet.App. 58a.

Assuming *arguendo* that some sort of credibility issue was properly raised on the appeal below, there is no indication in the record that it was a "demeanor" type of credibility question that petitioner now suggests in this Court. Nowhere does the District Court state that any credibility finding was based on the demeanor of the witnesses. Nowhere does the Fourth Circuit address the reviewability of "demeanor" type credibility findings.

In any event, merely inserting the talismanic term "credibility determinations" into critical factual findings is not sufficient to compel an appellate court to accept such findings blindly. Rule 52(a) cautions appellate courts to give "due regard . . . to the opportunity of the trial court to judge of the credibility of the witnesses." But once such "due regard" is given, Rule 52(a) does not dispense with the "unavoidable duty" of appellate courts to review all findings to determine if they are "clearly

15. It is absurd to say that a court's subjective characterization of the seriousness of a question asked by a witness seven years before trial depends upon that witness' credibility at the trial, particularly when the witness does not testify as to whether she had asked the earlier question facetiously or seriously. J.A. 121a. The "facetious" label was put on Boone's question after the trial; the label appears for the first time in Finding No. 9, Pet.App. 12a. It was the court's label, not Boone's.

See also *Miller* v. *Mercy Hospital, Inc.*, supra, 720 F2d 356, 365.

erroneous." While credibility findings are to be given more weight than other findings, they ultimately remain subject to the Rule 52(a) appellate review standards. See *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 534, n. 8 (1979).

Credibility, it has been said, "comprehends an overall evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." C. Wright and A. Miller, *Federal Practice and Procedure*, Vol. 9, p. 737 (1971). So, even assuming "due regard" is accorded the trial court's credibility assessments, the facts found as a result of credible testimony must still "hang together with other evidence." That process of seeing that all the evidence hangs together is performed first by the trial court, and ultimately by the appellate court in reviewing the entire record to see if the findings of fact are "clearly erroneous." See also *Miller v. Hospital Inc., supra*, 720 F2d 356, 365.

There is one final difficulty with petitioner's credibility thesis in this Court. She would put the cloak of unreviewable credibility findings more on the testimonial inferences of sex-bias than on purely factual testimonial conflicts. But without some ruling or some statement in the Fourth Circuit's opinion, or in the questions raised below by the parties, that provides a focus for this Court's consideration of the credibility claim, the claim cannot rise above the level of a request for an advisory opinion.

IV. Whether there is a "working wife defense" to an alleged employment discrimination on the basis of sex is not in issue in this case.

The petitioner and supporting *amici* persist in reading into a footnote in the Fourth Circuit's opinion (see Pet.App. 61a) a phantom, non-existent issue. Now the

third Question Presented in petitioner's brief on the merits[16] this non-issue is cast in these terms:

> Did the court of appeals err in holding that a prima facie case of employment discrimination on the basis of sex may be rebutted by proof that the responsible personnel officials permitted their wives to work?

The petitioner and *amici* purport to find the source of that question in footnote 5 of the Fourth Circuit's opinion. This footnote was appended to the following textual statements of the court (Pet.App. 60a-61a):

> We have already determined that the district court's findings with respect to Anderson's qualifications and her treatment in the selection process were clearly erroneous. Without these critical findings, the remaining evidence relied on by the district court is simply insufficient to support the district court's conclusion that the male committee members were biased.

Footnote 5 is appended at the end of the second sentence just quoted, and reads in its entirety as follows (Pet.App. 61a):

> 5. The district court concluded that bias was inferred from the failure of one of the male committee members to solicit applications from two female school teachers he knew and from remarks made by another committee member that it would be "real hard," in his opinion, for a woman to serve as Recreation Director. This evidence, however, is inadequate to support a finding of bias, and is dispelled by other portions of the record. For example, there is nothing to show the male committee members had a bias against working women. All four testified that their wives had worked and were accustomed to being away from home during evening hours. The wife of one committee member had worked a night shift for ten years and the wife of another had performed night work as a Registered Nurse.

16. This question has been downgraded from the first Question Presented in the petition for certiorari to the third Question Presented in petitioner's brief on the merits.

From the latter half of footnote 5, beginning with the sentence commencing with "For example," the petitioner has escalated the footnote into a holding of monumental proportions: "In the view of the court of appeals, marriage to working women effectively immunized the male committee members from any charge of employment discrimination on the basis of sex. The Fourth Circuit rule apparently extends to male officials whose wives had *ever* worked at any time during their marriage; in this case only one of the four wives was actually employed at the time of trial, and two of the four had not worked for years." Pet.brief, 78-79.

The petitioner's brief then adds the *in terrorem* claim that "The working wife defense, if sustained by this Court, would be available in most Title VII sex discrimination cases. Today over half of all married women have held such jobs at some point after their weddings. Thus virtually every married male personnel official in the nation qualifies for the working wife defense now recognized in the Fourth Circuit." Pet.brief, 79. The supporting *amici* brief of the ACLU, p. 46, sees equally disastrous consequences: "Dubbed by petitioner as the 'working wife defense,' such a notion would effectively insulate all men whose wives ever worked from any charge of intentional sex discrimination in employment."

To begin with, petitioner grossly mischaracterizes the Fourth Circuit's discussion in footnote 5 of the fact that the male Committee members testified that their wives had worked and were accustomed to being away from their homes during evening hours. That footnote statement was simply a part of the Fourth Circuit's careful inquiry into the entire record to determine if the District Court's conclusion that the male Committee members were biased was supported by sufficient evidence, or whether this fac-

tual conclusion was "clearly erroneous." This part of the inquiry was being conducted immediately following the Fourth Circuit's determination that the District Court's critical findings "with respect to Anderson's qualifications and her treatment in the selection process were clearly erroneous"; at this point, as the text of the opinion makes clear, the court was simply looking at "the remaining evidence" to see if it was sufficient to support the conclusion of bias.

The footnote reference to the working wives was thus used as an "example" of the insufficient record evidence of bias. Many more examples could have been cited, such as Auddie Boone's pre-interview statements to petitioner that the City would not consider a female for the job and that Kincaid had the position "locked up," or Boone's encouragement to petitioner to pursue Title VII redress after the interviews because only petitioner had been queried about night work and because the City wanted to hold the job open for Kincaid until he had graduated from college (which also reflected Boone's ignorance that Kincaid had graduated a year before the interviews). J.A. 118a. The court might also have noted, as further examples of insufficient evidence of bias, Boone's statements that she had "a woman's intuition" that Kincaid had the job before the interviews started, J.A. 114a, or one of the male Committee member's reference to the job as that of an "Athletic Director" rather than a "Recreation Director," J.A. 160a.

Moreover, the Fourth Circuit's entire opinion demonstrates that the testimony about the male Committee members' wives was not proffered by the respondent City as a defense to the charge of bias. Nor is there one syllable in footnote 5, or in any other part of the Fourth Circuit's opinion, that can properly be construed as holding that

testimony that a man's wife works immunizes "all men whose wives ever worked from any charge of intentional sex discrimination in employment." ACLU brief, 46. One may be confident that searching the term "working wife defense" on LEXIS or WESTLAW could not and would not retrieve footnote 5 of the Fourth Circuit's opinion.

That the "working wife defense" is a non-issue before this Court is further evidenced by the fact that the City, as the appellant in the appeal below, never raised any question or issue before the Fourth Circuit as to the so-called "working wife defense". The City had made no such defense at trial, and there was no reason to raise such a matter on appeal. While petitioner's brief (p. 77) attempts to extract such a contention from an isolated sentence in the City's Fourth Circuit brief, the controlling fact is that none of the four Issues Presented by the City in its Fourth Circuit brief raises any such issue.[17]

This is an appropriate occasion for applying the well-established proposition that "Ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 224 (1976). See also *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) ("Although [the] petition for certiorari presented

---

17. At page 1 of the City's brief before the Fourth Circuit, the only Issues Presented were:

1. Is the District Court's finding that the defendant subjected the plaintiff to disparate treatment in selection criteria clearly erroneous?

2. Is the District Court's finding that plaintiff was better qualified for selection for employment than the successful job candidate clearly erroneous?

3. Is the District Court's conclusion that defendant's selection criteria were discriminatory supported by the record?

4. Does the District Court's delegation to plaintiff's counsel of the drafting of findings of fact, conclusions of law, and judgment constitute error?

the question . . . that question was not raised in the Court of Appeals and is not properly before us").

V. Close appellate scrutiny of this record was necessary because of the manner in which the findings of fact and conclusions of law were prepared.

The petitioner nowhere denies or protests the Fourth Circuit's ruling that close scrutiny of the record in this case is justified by the manner in which the District Court's Findings of Fact and Conclusions of Law were prepared. Pet.App. 63a. While the District Court did not adopt these findings and conclusions verbatim from those proposed by petitioner, the prevailing party, it "did adopt the substance of her submission, with certain rewording and additions." Pet. App. 64a. And among the items entirely missing from the court's original Memorandum of Decision (Pet.App. 1a-5a) and inserted into the final findings and conclusions — at the sole insistence of the prevailing party — were two references to credibility matters (see Pet.App. 7a, 13a).

The Fourth Circuit has repeatedly condemned this practice of adopting all or substantially all the prevailing party's proposed findings of fact and conclusions of law. Virtually all other Circuits have likewise condemned it. See C. Wright and A. Miller, *Federal Practice and Procedure*, Vol 9, pp. 704-708 (1971). The decisions of this Court have warned that, while findings derived in this fashion will stand if supported by evidence, such a practice does not measure up to Rule 52(a) standards. See *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656 (1964); *United States v. Crescent Amusement Co.*, 323 U.S. 173, 185 (1944); *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 615, n. 13 (1974).

Rule 52(a) contemplates that the trial court — not the prevailing party — "shall find the facts specially and

state separately its conclusions of law thereon." Only if such findings are "drawn with the insight of a [trial judge's] disinterested mind," *United States v. El Paso Natural Gas Co., supra*, 656, should the findings be accorded the weight and deference conferred upon them by Rule 52(a). As put by the Third Circuit in *Roberts v. Ross*, 344 F.2d 747, 751-752 (3d Cir. 1965):

> The purpose of that rule is to require the trial judge to formulate and articulate his findings of fact and conclusions of law in the course of his consideration and determination of the case and as a part of the decision making process, so that he himself may be satisfied that he has dealt fully and properly with all the issues in the case before he decides it and so that the parties involved and this court on appeal may be fully informed as to the bases of his decision when it is made. Findings and conclusions prepared ex post facto by counsel, even though signed by the judge, do not serve adequately the function contemplated by the rule.

And in language particularly relevant to the instant case, the Third Circuit added that one of the prime evils of allowing the prevailing party to dictate many of the terms of the findings of fact is the danger that the findings will be "loaded down with argumentative over-detailed partisan matter much of which is likely to be of doubtful validity or even wholly without support in the record." 344 F.2d at 752.[18]

---

18. The *amicus* brief of the United States does not deny that the Findings of Fact were prepared in this case in the manner described by the Fourth Circuit. But the brief argues that "such actions by a district court would [not] warrant a court of appeals' undertaking to make de novo factual determinations in disregard of the deference a court of appeals should give to findings of fact and credibility determinations

(Continued on next page)

The danger that *Roberts v. Ross* foresaw has come to pass in this case. One need only compare the District Court's Finding of Fact and Conclusion of Law (Pet.App. 6a-32a) with the findings and conclusions proposed by the petitioner (J.A. 11a-33a) to see how strikingly similar they are. Because of their origin, the court's Findings of Fact are "loaded down with argumentative over-detailed partisan matter," *Roberts v. Ross, supra,* 752. And, as put by the Fourth Circuit in *Miller v. Mercy Hospital, Inc.,* 720 F.2d 356, 369 (4th Cir. 1983), cert. pending, No. 83-1629, (indulging in such a practice) "tends to deflect the court's attention from, or actually to obscure, the more difficult factual issues and credibility problems presented by the evidence".

But the point is not that such findings should be treated and evaluated as other than those of the trial court for purposes of Rule 52(a). The real point is that argumentative and partisan findings, which characterize the findings in this case, are so likely to be of doubtful validity or even wholly without support in the record that a close appellate scrutiny becomes necessary to preserve the integrity of the Rule 52(a) review standards.

Such close scrutiny is exactly what the Fourth Circuit gave the record in this case. From that kind of scrutiny it became clear to the Fourth Circuit that a mistake had been committed, that the critical findings prepared in this

---

(Continued from previous page)

under Rule 52(a)." U.S. brief, 16, n. 6. That argument is both meritless and a *non sequitur.* As we have demonstrated in Part I of the Argument in this brief, the Fourth Circuit did not engage in making de novo factual determinations. The actions that took place in this case operate to detract somewhat from the appellate deference that normally attaches to properly prepared findings of fact, at least to the point of justifying close scrutiny of the entire record by the court of appeals. That is all that the Fourth Circuit did in this case.

argumentative and partisan manner are indeed "clearly erroneous" within the meaning of Rule 52(a).

CONCLUSION

For these various reasons, the judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

ARTHUR C. BLUE, III
HENRY M. WHITESIDES
WHITESIDES, ROBINSON & BLUE
246 West Main Avenue
Gastonia, NC 28053

PHILIP M. VAN HOY*
MULLINS & VAN HOY
1001 East Boulevard
Charlotte, NC 28203
(704) 377-6022

EUGENE GRESSMAN
School of Law
University of North Carolina
Chapel Hill, NC 27514

Counsel for Respondent

*Counsel of Record

APPENDIX A

Petitioner's brief	Comment
p. 17: "the trial judge relied on the credibility of the witnesses in concluding that Kincaid was not asked such a question (about night work)"	The trial judge's Memorandum of Decision made no reference to credibility. References thereto were added by plaintiff's opinion, and incorporated verbatim into the court's final opinion.
p. 25: " . . . only petitioner was asked how her husband felt about her applying for the job."	The question was how amenable spouses were to applicant's job related night duties, and was broached by plaintiff's own witness to Kincaid, and to other male applicants by the selection committee.
pp. 25-26: "committee member Nichols . . . conceded that petitioner's sex was another motivating factor."	Not so, in context. J.A. 161a-162a
p. 27: "Committee member Helms, when asked why he voted for Kincaid, made no mention of Kincaid's college degree."	Trial Transcript: "Q: What specifically about his (Kincaid's) qualifications did you personally deem to be superior to those of Ms. Anderson? A: That he was specifically trained in the field of physical education and that he did have a degree in that field" J.A. 165
p. 33: "There was conflicting testimony as to whether Kincaid or the other men had been asked about night work"	ref: Statement of Facts, *supra*, pp. 8-11, and joint appendix references therein.
p. 35: "Inquiries of female job applicants about their families or marital plans . . ."	No such inquiries were made of petitioner, by anyone.
pp. 36-37: "In this case no witness suggested Kincaid was asked if his spouse objected to his working for a living"	No one was so questioned, including petitioner

p. 38: "If asked a question such as 'how does your husband feel about your working for a living . . .'"	Male applicants were queried about willingness of them and their families for them to work at night, which queries were job related, and which queries each committee member personally knew were job-related. Statement of Facts, *supra*, pp. 8-11
p. 39: "It is often irrelevant whether identical questions were asked of men"	
p. 40: "(Committee member) Butler acknowledged he did not actually know whether the two admittedly qualified women were making more or less than the salary being offered for the Recreation Directors" *(sic.,* Director)	Not so, J.A. 148a-149a
p. 43: " . . . a standardless selection process left the committee members free to use their own biases in the selection"	Every committee member personally knew what the job requirements were, by reference to their personal involvement in the City's recreation program. Statement of Facts, *supra*, pp. 2-3, and J.A. references therein
p. 46: " . . . petitioner had twenty years of experience in a variety of positions related to the job of Recreation Director.	Petitioner's recreation experience was limited to one year, which concluded eighteen years before her application with petitioner. Appendix B, *infra*, and J.A. references therein.
p. 46: "Only petitioner had actually organized and officiated at recreational activities . . ."	Kincaid had like or greater such experience. Appendix B, *infra*, and J.A. references therein.
p. 46: "(Petitioner) had received a N.C. State Recrea-	Petitioner testified that she had no recollection of what

tional Director's Certificate, which is awarded based on . . . experience."	she did, if anything, to qualify for the certificate, which she received 18 years before applying with respondent, and did not even know if it was then still active or in force. J.A. 99a-101a
p. 47: " . . . the defendant's after the fact emphasis on possession of a degree in physical education was pretextual"	All selection committee members except Boone testified they selected Kincaid in whole on part because of his recreation degree.
pp. 54-55: "Because of his participation in the Optimist Club, Kincaid was recruited for the job.	Kincaid was not, and never stated he was, an Optimist
p. 55: "(Kincaid's) critical advantages associated with involvement in the Optimist Club were closed to petitioner because of her sex."	Kincaid's nexus with the Optimist Club was as a volunteer participant in its recreation programs for the City, which opportunities were available to female volunteers, including petitioner. J.A. 89a-90a.
p. 55: "When petitioner interviewed for the position, she was subjected to a demeaning inquiry about whether her spouse approved of her applying for the job, an inquiry that was not and could not conceivably have been made of a male candidate."	The pertinent questions concerned the candidates' and their families' willingness to work at night, not to apply for the position. Such questions were asked of all candidates, including of Kincaid by plaintiff's witness Boone. J.A. 121a.
p. 74: "Boone, Butler and Nichols each gave a different version of what was asked of Kincaid."	No difference in substance, particular with reference to the passage of seven years between the interview and the trial.
Brief of ACLU, et al	Comment
p. 6: (Candidate Broadway) had also participated in the Optimist recreation program.	Optimist program in Cramerton, N.C., not Bessemer City. J.A. 73a

p. 7: "she (petitioner) worked supervising a hospital recreation program"	J.A. 59a (petitioner's own resume): "instructed patients in recreation program." Also, admission at trial that she did not supervise employees in this, her only recreation position, which concluded some 18 years prior to her application with petitioner. J.A. 98a-99a
p. 24: "There was no evidence that Kincaid's family responsibilities or wife's opinion would *not* interfere with their job performance, but that possibility was never considered."	All candidates were questioned about their families' willingness for them to work at night; Kincaid was so queried by petitioner's witness Auddie Boone. J.A. 121a
p. 25: "Boone charged repeatedly that the committee was biased against Anderson because of her sex, a charge the male committee members did not even answer."	Trial examination of male committee member Helms: "Q: Do you remember any comments during that discussion by Auddie Boone? A. Yes, sir. Auddie sat on my right and kept telling me the only reason we weren't considering Ms. Anderson was because she was a woman. I told Auddie that it was irrelevant whether Ms. Anderson was a woman or not, but Auddie was very audible about that." J.A. 166a
p. 42: (In a cited case purportedly analogous), "she was asked questions, not asked of male applicant, about her marital status, her children, child care arrangements, and childbearing plans."	None of these inquiries were made, or even alleged to have been made, by any member of the Selection Committee.

APPENDIX B

Anderson's qualifications	Kincaid's qualifications
1. In 1975, Anderson was 39 years of age, a native and resident of Bessemer City. She was married and had two teen-aged sons. J.A. 58a.	1. Kincaid was a 24-year-old native and resident of Bessemer City. He was a 1974 college graduate and had recently been married. Pet. App. 18a.
2. Anderson most recently had been employed, for several years, as a substitute and full-time elementary school teacher. J.A. 87a.	2. Kincaid had been employed in 1974-1975 in the finance department of Commercial Credit Corp. J.A. 62a.
3. In 1959, Anderson had been a receptionist and nurse's aide for three doctors, while her husband attended college. J.A. 59a. In 1961-1963, she had worked as a sales clerk in a department store. J.A. 59a.	3. In 1973-1974, Kincaid had done his student teaching at a high school in Mountain City, Tennessee, in fulfillment of his degree requirements. As a student teacher, he taught physical education. J.A. 126a.
4. Anderson received an A.S. degree from Sacred Heart Junior College in 1964, and a B.A. degree from Sacred Heart College in 1973. She had also taken individual courses in government, history, logic, guidance, and decoupage in two other colleges.	4. Kincaid received a B.S. degree in Health and Physical Education from Appalachian State University, in North Carolina, in 1974. He also secured a state teaching certificate in 1974. J.A. 129a.
5. Anderson had also worked for one year, in either 1956 or 1957 (some 18 years before applying for the position in question), at a state mental facility, Broughton Hospital, in Morganton, N. C. She testified at trial that she was employed in the recreation department at the hospital; "I was in charge of patients there. I was in charge of supervising activities inside the	5. Kincaid's courses of study at college included: (a) numerous courses in team sports, including how to teach and evaluate sports; (b) courses in teaching physical education to elementary school students; (c) courses in education of secondary school students, with emphasis on teaching physical education; (d) first aid for athletic injuries; (e) organizing and administer-

wards and also outside the wards. We had to direct other employees that worked in the Recreation Department in some areas that they did not know how to do. I also planned dances, helped supervise in ballgames, croquet, various activities like that." J.A. 86a. But Anderson had no authority, in her job at the hospital, to hire, fire or discipline anyone, although she did supervise and direct some employees "when we put on a dance program . . . as to what kind of dancing, how to go about doing it." J.A. 98a-99a. She could not remember at trial what her job title was at the hospital. J.A. 99a.

6. Anderson received a state certificate as a recreator, while working at Broughton Hospital nearly 20 years earlier. But she could not remember at trial if a test was required to obtain the certificate. J.A. 100a. There was no evidence that she ever used the certificate, or that it even was in force in 1975. J.A. 100a-101a.

7. There was no trial evidence that Anderson had any educational training in physical education, other than that covered by her general training to be an elementary school teacher. As a mother and teacher, she had participated in certain sport activities until "it got too rough for me." J.A. 89a. She concededly had no

ing physical education facilities, including budgeting, organizing sports leagues and programs, purchasing, insurance, maintenance, and planning and developing recreation facilities. These courses covered such sports as football, soccer, basketball, track and field, badminton, tennis, and volleyball. J.A. 125a-126a.

6. Kincaid acquired a state certificate as a physical education teacher, after taking the National Teachers' Examination. He was also a member of both the state and national recreation and parks societies. J.A. 124a.

7. As a native of Bessemer City, Kincaid had played in various team sports on the same fields and in the same facilities over which the Bessemer City Recreation Director would have responsibility. As an elementary and high school student, Kincaid had participated in organized football, organized basketball, or-

training or experience in (a) organizing sports leagues, (b) umpiring, (c) lifeguarding, (d) first aid for athletic injuries, (e) public speaking about recreation or physical education, (f) recruiting officials or umpires for sports events, (g) purchasing athletic equipment, (h) studying rules of team sports, or (i) budgeting a recreation or sports program. J.A. 92a-93a. She admitted she did not know that such matters were part of the duties of being the Bessemer City Recreation Director. J.A. 93a.

8. Anderson also had experience in such activities as decoupage, piano playing, music and public speaking at P.T.A. and other club meetings. She had also taken a Dale Carnegie course in public speaking. J.A. 92a.

9. The District Court found that Anderson's foregoing experiences made her the more qualified: "She had direct experience, teaching, supervising, directing programs, raising money, speaking to the public, handling budgets, and planning activities, that Kincaid did not have. Both candidates know the rules of most sports; both had actively participated in sports." Pet. App. 19a.

ganized baseball, and swimming. J.A. 127a. In addition, he had actively participated in operating Bessemer City's volunteer recreation program, following his graduation from college, in which he umpired, coached and help maintain the City's recreation facilities. J.A. 128a.

8. Kincaid told the Selection Committee that, in addition to setting up athletic programs, he was prepared to incorporate programs in slimnastics, ballet, tap dancing, jazz and decoupage into the City's overall recreation program. J.A. 131a.

9. The District Court conceded that Kincaid "had personally played more of the traditionally male dominated sports" and had a degree in physical education and health. Pet.App. 19a. But Kincaid's degree was offset by Anderson's degree in education, for which she was required to take physical education classes. And Kincaid was found to have few of the recreation-oriented experiences that Anderson had.

REPLY

BRIEF

FILED
NOV 23 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1623

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PHYLLIS A. ANDERSON,

Petitioner,

v.

CITY OF BESSEMER CITY, etc.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

JONATHAN WALLAS
JOHN T. NOCKLEBY
Ferguson, Watt, Wallas
& Adkins, P.A.
Suite 730
951 S. Independence Boulevard
Charlotte, North Carolina 28202
(704) 375-8461

J. LEVONNE CHAMBERS
RONALD L. ELLIS
ERIC SCHNAPPER*
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

Counsel for Petitioner

*Counsel of Record

TABLE OF AUTHORITIES

	Page
Carolene Products Co. v. United States, 304 U.S. 144 (1938) ..	13
Cooper v. Federal Reserve Board, No. 83-185	17
Lanpher v. Prokop, 703 F.2d 1311 (D.D.Cir. 1983)	10
Scheller-Globe Corp. v. Milsco Mfg. Co., 636 F.2d 177 (7th Cir. (1980)	17
Schwerman Trucking Co. v. Gartland Steamship Co., 496 F.2d 466 (8th Cir. 1974)	17
Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981)	9

No. 83-1623

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

PHYLLIS A. ANDERSON,

Petitioner,

v.

CITY OF BESSEMER CITY, etc.

==========

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

==========

REPLY BRIEF FOR PETITIONER

==========

(1) The importance of the Rule 52 limitation on appellate review of factual findings is demonstrated with exceptional clarity by the Brief for Respondent. Respondent's disagreement with the trial court's findings of fact is not limited to the ultimate issue of whether or not there was intentional discrimination; respondent

insists that essentially all the district court's findings with regard to controverted factual issues were mistaken. Respondent singles out for particular attack findings by the district court regarding sexually stereotyped questions (R. Br. 7-10, 31-32), the biases of the male committee members (R. Br. 14-18), selective recruiting of male applicants (R. Br. 33-37) and the comparative qualifications of petitioner and Kincaid (R. Br. 10-14, 32-33, 5a7a). These arguments pervasively demonstrate the complex and conflicting nature of the evidence whose differing inferences the trial court was required to resolve. Respondent appends to its brief an Appendix referring to 24 other subsidiary factual disputes (R. Br. 1a-4a), most of which were also resolved by the trial court in a manner to which respondent here objects. The twenty-five printed pages of

discussion of these various factual questions is more than twice the length of the post-trial memorandum on the same issues filed by respondents in the district court.[1]

The factual arguments advanced by respondent are in most instances not new; similar contentions were advanced unsuccessfully in the district court. Many of respondent's arguments are not frivolous. The record in this case is replete with direct conflicts between the witnesses called by petitioner and respondent, as well as with testimony which, although not contradicted, could be interpreted in a number of different ways. If the "clear error" rule required reversal merely because there was some evidence to support the claims of the party which lost at

---

[1] Respondent to Petition for Writ of Certiorari, pp. 29a-41a.

trial, reversal would be appropriate here, and in virtually every other case. But that is not the standard of review established by Rule 52 and the decisions of this Court. Once a trial court has resolved the conflicting factual claims of the parties, its findings must be upheld so long as the record contains substantial evidence to support those findings. The existence of "clear error" cannot be established merely by reciting only the evidence adduced at trial by the unsuccessful party, evidence which, if believed and considered in isolation from the rest of the record, might have persuaded the trial court to reach a different conclusion.

The inappropriateness of appellate fact finding in this case is demonstrated with particular clarity by the dispute concerning whether Kincaid was asked a question about his willingness to work at

night. Four witnesses testified about this issue. Boone testified that no such question was asked, but noted that she had made a statement to Kincaid on the subject. (J.A. 121a). Butler recalled the subject arising, but could not recall whether Boone had made a statement or asked a question. (J.A. 145, 151). McClellan insisted there had been a question (J.A. 158a). Kincaid could not recall anything other than what he himself had said (J.A. 129a) Thus the issue of whether Kincaid had been asked a question, or whether all that had occurred was a statement by Boone, turned on whether the trial judge chose to believe Boone or McClellan. The trial judge believed Boone.

In this Court respondent insists that the trial judge's finding was "clear error". Under these circumstances respondent's argument amounts to little

more than a claim that the trial judge believed the wrong witness. Such a claim, under circumstances such as this, is simply insufficient to establish clear error. When a trial judge is forced to resolve a simple conflict in the testimony of two witnesses with comparable personal knowledge of an event, neither possible resolution could ordinarily be said to be clear error. Had the trial judge in this case chosen to believe McClellan, and held that Kincaid was asked about night work, we could not have successfully attacked that decision on appeal; the judge's actual decision to believe Boone instead is no less protected by Rule 52.

In our principal brief we argued that distict trial court findings with regard to demeanor are not subject to appellate review, and suggested that in this case the trial court's decision regarding the asking of sexually stereotyped questions

was such a finding. We therefore urged that the Fourth Circuit erred as a matter of law in reconsidering the trial judge's decision on that issue. (P. Br. 58-75). Respondent contends, however, that even if the Fourth Circuit did err, its error cannot be corrected by this Court because the Fourth Circuit compounded the error of its action by refusing to discuss the legality of such appellate consideration of credibility issues. Petitioner expressly relied on the trial court credibility determinations in her brief in the court of appeals,[2] but respondent insists that this is insufficient to preserve the issue, since the Fourth Circuit opinion "does not address or resolve its power under Rule 52(a) to review credibility-based or demeanor-based findings...." (R. Br. 38). On this view

---

[2] Brief of Appellee, pp. 24, 26-27, 28 (4th Cir., No. 83-1278).

the exercise of a power inconsistent with the Federal Rules of Civil Procedure is to be permitted so long as the errant court does not bother to defend the legality of its action. No decision of this Court provides any basis for this proposal to give the lower courts the authority to so insulate their errors from review.

(2) Respondent argues at length that Kincaid was more qualified than petitioner, appending to its brief an Appendix setting forth several dozen differences in the backgrounds and experiences of those two applicants. (R. Br. 10-14, 5a-7a). At trial, however, the only explanation offered by the respondent's witnesses for their decision to hire Kincaid was Kincaid's possession of a degree in physical education. In this Court respondent now suggests a large number of other possible explanations; it argues, for example, that Kincaid evinced an

interest in "slimnastics, ballet [and] tap dancing" (R. Br. 7a), while petitioner allegedly did not. However desirable it might be to hire a balletomane as a recreation director, the fact remains that no witness testified that Kincaid was selected because of his knowledge and appreciation of ballet. As this Court emphasized in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248-255 n.9 (1981), "[a]n articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely through ... argument of counsel." Burdine requires an employer to adduce specific evidence to support any explanation of its conduct "to focus the issues and provide plaintiff with 'a full and fair opportunity' to attack the defendant's purported justification. That purpose is

defeated if defendant is allowed to present a moving target...." Lanpher v. Prokop, 703 F.2d 1311 (D.C.C. 1982)

(3) The working wife defense, once embraced with enthusiasm by respondent, is now spurned by it with equal fervor. We noted in our principal brief that, both at trial and in the court of appeals, counsel for respondent expressly relied on the working wife defense. (P. Br. 77). In its Response to Petition for Writ of Certiorari, respondent repeatedly claimed credit for having created and presented this argument below:

> [T]he "working wife" issue was a portion ... of respondent's rebuttal to the prima facie case .... [T]he "working wife" issue was part and parcel of the entire rebuttal overlay.[3]

[3] Response to Petitioner for Writ of Certiorari, p. 16.

Respondent also acknowledged that "the working wife testimony was ... treated by the Circuit, as ... cumulative rebuttal evidence which, when viewed in light of the entire record, dispelled the inference of discrimination created by petitioner's establishment of a prima facie case."[4] In the Brief for Respondent in this Court the employment histories of the four wives are prominently featured in the Statement of the Case (R. Br. 2-4), just as they were in respondent's brief in the court below.

At pages 41-46 of its brief in this Court, however, respondent now boldly disavows the entire working wife argument. It insists

> [T]he testimony about the male Committee members' wives was not proferred by the respondent City as a defense to the charge of bias. (R. Br. 44).

[4] Id. pp. 15-16 (emphasis omitted).

This is precisely the opposite of the position taken by respondent at trial[5] and in opposition to certiorari. Counsel for respondent now offers no alternative explanation of why its own trial counsel systematically proferred such testimony from all four male committee members and none can readily be imagined. Similarly, respondent now insists the working wife argument was never "considered or approved by the Fourth Circuit." (R. Br. 24). This is precisely the opposite of the position taken by respondent less than six months ago in opposing the grant of certiorari in this case.

---

[5] J.A. 146a (employment history of committee member's wife was relevant "[t]o show the witness is not prejudiced against a wife working at night.") Compare R. Br. 24 ("No such defense was ever offered by the City"), 45 ("The City had made no such defense at trial....")

We believe that respondent's earlier characterization of its previous contentions, and of the Fourth Circuit's opinion, were more accurate. The relevant portion of the opinion below makes clear that the court of appeals regarded the employment histories of the four wives as having "dispelled the evidence of discrimination.[6] (Pet. App. 61a).

---

[6] This portion of the Fourth Circuit's opinion is fully binding on the lower courts in that circuit, and of precedental importance in other circuits, despite the fact that the passage occurs in a footnote. A number of the most important legal principles applied by this Court were themselves first announced in footnotes. See, e.g., Carolene Products Co. v. United States, 304 U.S. 144, 152 n.4 (1938). In Title VII cases arising in Maryland, Virginia, West Virginia, North Carolina and South Carolina, federal judges are today required to permit a defendant to "dispel" direct proof of unlawful discrimination on the basis of sex by adducing evidence that the responsible official was married to a woman who works or worked for a living. A federal district judge in those states would have little choice but to regard such exculpatory evidence as conclusive, since in this case the Fourth Circuit held it sufficient to dispel the effect of a candid admission by committee member

Reasonable readers might disagree as to the precise weight the Fourth Circuit has directed the lower courts to give to a working wife defense. Respondent, however, does not undertake to defend that doctrine in either its literal virulent form or some milder version, but disavows it entirely. The proffer of the relevant evidence at trial, the repeated references to that evidence in earlier defense briefs, the Fourth Circuit's apparently approving discussion of this defense, all, respondent now insists, were developments which never had or were intended to have any purpose or meaning. This account of the proceedings and decision below, an account entirely at odds with respondent's initial position in this Court, is manifestly inaccurate. A party responsible for such an ill-conceived idea should

not be permitted to shield it from scrutiny simply by brazenly denying the existence and paternity of that doctrine.

(4) Respondent suggests, finally, that the standard of appellate review in this case should in some way be affected by the fact that the district court, prior to adopting its February 1983 findings of Fact and Conclusions of Law, had solicited proposed findings and comments from the parties (R. Br. 46-49). In this case, however, the trial court did not adopt verbatim findings proposed by a party; whatever problems might be posed by such a procedure are not presented by this appeal.

It is unclear how respondent contends this Court should treat the findings of the trial judge in this case. In a number of passages respondent appears to urge this Court to totally disregard particular findings because they were

contained in the February 1983 Findings of Fact, rather than the September 1982, Memorandum of Decision (R. Br. 20, 33). Elsewhere respondent disavows any implication that a special standard of review is warranted. (R. Br. 48).[7] Additionally, or perhaps in the alternative, respondent urges that the February 1983 Findings should be subjected to "close scrutiny" (R. Br. 48-49); whether close scrutiny is a standard different than the Rule 52 clear error rule, or merely calls upon the courts to work harder and more diligently in applying the usual standard, is itself unclear.

The courts of appeals have for some time been concerned about the trial court practice -- a practice which respondent admits was not followed in this case (R.

[7] "But the point is not that such findings should be treated and evaluated as other than those of the trial court for purposes of Rule 52(a).

Br. 46) -- of adopting verbatim the findings of fact proposed by a litigant.[8] The solicitation and use of proposed findings can be of considerable assistance to a busy trial court, especially when a case involves complex or voluminous facts, many of which may not be in dispute.[9] On the other hand, the limited standard of review contemplated by Rule 52 is a standard applicable only to Findings of Fact that are set forth by "the court" and that constitute "the grounds of its action." The mere fact that a trial judge has placed his or her signature at the end of findings of fact drafted in whole or part by counsel for an interested party

[8] See Petition for Writ of Certiorari, Cooper v. Federal Reserve Board, No. 83-185, pp. 19-37.

[9] See, e.g., Scheller-Globe Corp. v. Milsco Mfg. Co., 636 F.2d 177, 178 (7th Cir. 1980); Schwerman Trucking Co. v. Gartland Steamship Co., 496 F.2d 466, 475 (8th Cir. 1974).

does not guarantee that the contents of these findings actually represent "the grounds of [the court's] action."

The particular procedure leading to the entry of findings of fact can and should be scrutinized to assure that the substance of those findings indeed reflect the thoughts and reasoning of the trial judge. In some cases no such conclusion will be possible. If a trial judge simply announces that he has ruled for one litigant, asks one party to propose an opinion or findings, and then signs the proposal as submitted, an appellate court would be justified in concluding that those findings did not represent the grounds of the trial judge's opinion. Where a trial judge has done no more than indicate which party is to prevail, it is inconceivable that counsel for a party could subsequently correctly guess and

articulate in detail the unspoken reasons which had led the judge to arrive at that decision.

In this case, however, there is no reason to doubt that the February 1983 Findings represent the "grounds" of the district court's decision, and are thus subject to the usual Rule 52 standard of review. Following the completion of the trial, the district court had issued a Memorandum of Decision concisely setting forth its reasons for ruling for petitioners; respondent does not question the legitimacy of that opinion. The district court then requested counsel to submit "a somewhat enlarged version of this memorandum in the form of proposed findings of fact, conclusions of law, and an appropriate judgment," (Pet. App. 5a), and expressly asked the defendant to comment

on those proposals so that the final opinion "may reflect consideration of the input of both sides".[10]

The Findings of Fact actually adopted in February 1983 are considerably different from the findings proposed by petitioner, and in many important respects are more detailed. The trial judge's Findings with regard to sexually stereotyped questions, for example, is far longer than those suggested by petitioner, and includes its own detailed analysis of the relevant testimony. Overall only a handful of sentences proposed by petitioner were actually utilized verbatim in the actual opinion. The trial court's Findings contain 58 citations to exhibits and various portions of the trial transcript; petitioner's proposed findings included no similarly detailed analysis of

[10] Response to Petition for Writ of Certiorari, 3a.

the record. Whatever the appropriate appellate disposition of an appeal involving findings adopted verbatim as proposed by counsel, this is not such a case.

CONCLUSION

For the above reasons, the judgment and opinion of the Fourth Circuit should be reversed and the case remanded with instructions to affirm the findings of the district court.

Respectfully submitted,

JONATHAN WALLAS
JOHN T. NOCKLEBY
Ferguson, Watt, Wallas
& Adkins, P.A.
Suite 730
951 S. Independence
Boulevard
Charlotte, North Carolina
28202
(704) 375-8461

J. LeVONNE CHAMBERS
RONALD L. ELLIS
ERIC SCHNAPPER
16th Floor
99 Hudson Street
New York, New York 10013

Counsel for Petitioner

*Counsel of Record